Supreme Court, U.S.
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No. OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1995

ISMAEL R. DIAZ,

Petitioner,

vs.

DEPARTMENT OF THE AIR FORCE,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether the United States Court of Appeals for the Federal Circuit abused its discretion and denied due process by relying on the Supreme Court decision, *Brock v. Pierce County*, 476 U.S. 253, 259-260 (1986) in determining that violation of 5 U.S.C. § 4303(c) was simply a procedural violation to be considered as harmful error under 5 U.S.C. § 7701(c)(2)(A)?

II. Whether the United States Court of Appeals for the Federal Circuit abused its discretion and denied due process by failure to follow prior Supreme Court decisions in *McCormack v. United States*, 204 Ct. C1. 371 (Ct. C1. 1974); *Yuni v. MSPB*, 784 F.2d 381 (Fed. Cir. 1986), [86 FMSR 7017]; *Morton v. Ruiz*, 415 U.S. 199, 94 S. Ct. 1055, 39 L. Ed. 2d 270 (1974); *Service v. Dulles*, 354 U.S. 363, 77 S. Ct. 1152, 1 L. Ed. 2d 1403 (1957); *United States v. Monsanto*, 491 U.S. 600, 607, 109 S. Ct. 2657, 2662, 105 L. Ed. 2d 512 (1989) and in its own decisions in *Baracco v. Department of Transportation*, [83 FMSR 7021] (1983), *aff'd*, 735 F.2d 488 (Fed. Cir.) [84 FMSR 7028], *cert. denied*, 469 U.S. 1018 (1984); *Handy v. U.S. Postal Service*, 754 F.2d 335-38 (Fed. Cir. 1985) [85 FMSR 7003); *Lovshin v. Dept. of Navy*, 767 F.2d 826 (Fed. Cir. 1985) [85 FMSR 7038], *cert. denied*, 475 U.S. 111 (1986) and *Shiflett v. U.S. Postal Service*, Civ. No. 87-3391 (Fed. Cir. Feb. 8, 1988) [88 FMSR 7008].

III. Whether the United States Court of Appeals for the Federal Circuit and the Merit Systems Protection Board has effectively negated the congressional mandate of affirmative defenses contained in 5 U.S.C. § 7701(c)(2)(B) and 5 U.S.C. § 7701(c)(2)(C)?

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Petitioner, Ismael R. Diaz, respectfully prays that a writ of certiorari be issued to review the order and decision of the United States Court of Appeals for the Federal Circuit issued in the above proceeding October 17, 1995.

OPINIONS BELOW

The Court of Appeals denied petitioner's request for a rehearing and a suggestion for a rehearing in banc on October 17, 1995. (App. A, 1a). On August 21, 1995 the Court of Appeals sustained the removal action and the prior Merit Systems Protection Board's (MSPB) decisions by holding that an agency's violation of a statutory procedural requirement does not necessarily invalidate the agency action, especially where Congress has not expressed any consequences for such a procedural violation. (App. B, 6a). The MSPB denied a petition for review on November 18, 1994 holding that the petition did not meet the criteria for review set forth at 5 C.F.R. § 1201.115. (App. C, 10a). The MSPB sustained the removal action in its initial decision entered June 3, 1994 holding that failure to follow the statutory and regulatory time limitations was a procedural violation to be considered under the harmful error criteria of § 7701(c)(2)(A) and arguments regarding prohibited personnel practices and not in accordance with law were without merit. (App. D).

STATEMENT OF JURISDICTION

The Court's jurisdiction is invoked under 28 U.S.C. § 1254(1). Jurisdiction in the Court of Appeals was invoked under 5 U.S.C. § 7703(b)(1) and 28 U.S.C. § 1295(a)(9). Jurisdiction of the MSPB for the petition for review was invoked under 5 U.S.C. § 7701(e)(1) and 5 C.F.R. § 1201.114 *et seq.* The initial appeal to the MSPB was submitted under the jurisdiction of 5 U.S.C. § 4303(e), 5 U.S.C. § 7701(a) and 5 C.F.R. Part 1201.

STATUTORY PROVISIONS INVOLVED

This case involves the relationship between Chapters 23, 43 and 77 Title 5 United States Code.

STATEMENT OF THE CASE

A writ of certiorari is requested in this case to allow this Court to review the court of appeals' decision (App. B) that failure to remove Diaz within the statutory period was a procedural error subject to harmful error analysis and argument that the Air Force committed prohibited personnel practices was without merit. A brief summary of the background facts and proceedings follows.

Diaz was employed as a GS 13 chemist by the Air Force at Kelly Air Force Base, Texas when on January 28, 1993 he was notified that his performance was unsatisfactory in critical elements 2 and 3 of his performance plan and was given 60 days to improve.

On April 16, 1993 Mr. Dunn, the immediate supervisor prepared a rating for the period October 29, 1992 to April 15, 1993 on which his overall performance was rated as "Unacceptable." Mr. Diaz was notified that his performance continued to be unsatisfactory in Elements 3 and 4 and was given until July 23, 1993 to bring his performance up to a fully successful level.

An annual performance evaluation and appraisal was completed for the period July 1, 1992 to June 30, 1993 which was signed by the rater on August 21, 1993, reviewed by Mr. Makris on August 24, 1993 and signed by Diaz on September 10, 1993. The rating indicates that petitioner did not meet the requirements of elements 2, 3, and 4 and had an overall rating

of "Unacceptable". On September 20, 1993 Mr. A.B. Haswell informed the Civilian Personnel Office that the supervisor had incorrectly assigned a "did not meet" rating to Element 2E.

On October 26, 1993 Mr. Dunn issued a notice of proposed removal for unacceptable performance from October 29, 1992 to October 26, 1993 on performance elements 3 and 4 of the performance plan. The letter states that "you are hereby notified that it is proposed to remove you from the Federal Service not earlier than 30 days from your receipt of this letter." A reply to the proposed notice was submitted on November 16, 1993.

The letter of final decision/removal was issued on February 2, 1994 with an effective date of removal of February 11, 1994.

An appeal was sent to the Dallas Regional MSPB Office and on June 3, 1994 an initial decision was issued which sustained the removal. (App. D). A petition for review was submitted to the Merit Systems Protection Board and on November 18, 1994 the Board denied the petition on the grounds that it did not meet the criteria for review set forth at 5 C.F.R. § 1201.115. (App. C, 10a).

The United States Court of Appeals for the Federal Circuit was asked to review the MSPB decision and after oral argument the court on August 21, 1995 affirmed the MSPB. (App. B, 4a).

A motion for rehearing was submitted with a suggestion that the rehearing be in banc and that was denied on October 17, 1995. (App. A, 1a).

REASONS FOR GRANTING THE WRIT

The decision of the court of appeals in this case appears to be in direct conflict with the provisions of Chapters 23, 43 and 77 Title 5 U.S.C., with prior decisions of this Court and with prior decisions of the court of appeals governing removal actions from federal service for unacceptable performance pursuant to Chapter 43 Title 5 U.S.C. The court of appeals and the MSPB have foreclosed the use of affirmative defenses provided by Congress and delineated in 5 U.S.C. § 7701(c)(2)(B) and (C).

I.

WHETHER THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT ABUSED ITS DISCRETION AND DENIED DUE PROCESS BY RELYING ON THE SUPREME COURT DECISON, *BROCK V. PIERCE COUNTY*, 476 U.S. 253, 259-260 (1986) IN DETERMINING THAT VIOLATION OF 5 U.S.C. § 4303(c) WAS SIMPLY A PROCEDURAL VIOLATION TO BE CONSIDERED AS HARMFUL ERROR UNDER 5 U.S.C. § 7701(c)(2)(A).

Argument was put to the MSPB and the court of appeals that the legal, statutory and regulatory right to take the removal action had long expired before the decision was issued and the agency's action was in violation of the law, OPM and agency regulations and must be reversed as being not in accordance with law under 5 U.S.C. § 7701(c)(2)(C).

The MSPB initial decision acknowledged:

> . . . it is clear that the appellant's advance notice period expired after thirty days.

> Without any extension to that notice period, the agency should have issued its decision on the proposal not later than thirty days after the time, or sixty days after October 26, 1993, which was December 25, 1993. Thus, the agency failed to follow the procedures regarding the notice period as set forth in 5 U.S.C. § 4303 and 5 C.F.R. § 432.107. Even though the agency committed error by this delay, it is subject to the harmful error analysis. *Faust*, 29 M.S.P.R. at 499. . . .

(App. D, 41) and at footnote 18 stated:

> The appellant alleged that his claim that the agency exceeded the notice requirements set forth in 5 U.S.C. § 4303 is an affirmative defense in violation of the law, rather than harmful error. This issue has previously been resolved by the Board, however, and it was determined that a violation of these notice requirements can be the basis for reversing an agency action only if harmful error is proven. *See, e.g., Faust v. Smithsonian Institution*, 29 M.S.P.R. 496. 499 (1985).

(App. D, 38a).

The court of appeals rejected Diaz's argument by stating:

> An agency's violation of a statutory procedural requirement does not necessarily invalidate the agency action,

> especially where Congress has not expressed any consequences for such a procedural violation.

Citing *Brock v. Pierce County*, 476 U.S. 253, 259-60 (1986) (App. B, 6a). Further, the court of appeals stated that in analyzing the statutory language of 5 U.S.C. § 7701(c)(2)(A) regarding harmful error that: ". . . we have previously held that an employee challenging an agency action has the burden to prove that a violation of a statutory procedure was harmful . . ." citing *Handy v. United States Postal Service*, 754 F.2d 335, 338 (Fed. Cir. 1985) (App. B, 7a).

A review of *Handy, supra,* will reveal that the court of appeals discussed the difference between harmful error (§ 7701(c)(2)(A)) and decision not in accordance with law (§ 7701(c)(2)(C)) and noted that the two paragraphs are not directed to the same end. Harmful error in procedures (paragraph A) raises the question: Did the wrongful procedures harm the employee in the presentation of his defenses so that a different result might have been reached? Paragraph (C) on the other hand, is directed to the decision itself. Was the decision in its entirety in accordance with law?

The Federal Circuit had previously explored, examined and explained the interrelationship of Chapters 23, 43, 75, and 77 Title 5 USC as amended in 1978 by the CRSA. *Lovshin v. Dept. of Navy*, 767 F.2d 826 (Fed. Cir. 1985) [85 FMSR 7038], *cert. denied*, 475 U.S. 111 (1986). Some applicable comments made by the court of appeals include: (1) The MSPB is without authority to change the statutory design (at 841); (2) Under § 2302(b)(11) it is a prohibited personnel practice to violate the merit principles set out in § 230 (at 833); and (3) An employee sought to be removed under Chapter 43 is entitled to be rated on reasonable standards and to have the specific

procedures of Chapter 43 applied in connection with those standards. This protection is the *quid pro quo* for the lesser burden on the agency under that chapter (at 842).

Congress, in P.L. 95-454 (1978) authorized a different procedure to be followed in removal for unacceptable performance. Chapter 43 Title 5 U.S.C. prescribes procedures but also places a statutory limitation on the action. Congress first provided for a procedure to extend the notice period by stating:

> An agency may, under regulations prescribed by the head of such agency, extend the notice period under subsection (b)(l)(a) of this section for not more than 30 days. An agency may extend the notice period for more than 30 days only in accordance with regulations issued by the Office of Personnel Management.

5 U.S.C. § 4303(b)(2) but then decreed:

> The decision to retain, reduce in grade or remove an employee (1) shall be made within 30 days after the date of the expiration of the notice period. . . .

5 U.S.C. § 4303 (c)(l).

The legislative history of P.L. 95-454, Civil Service Reform Act of 1978 provides an explanation of the law in question, to-wit:

> Section 4303 places two restrictions on agencies to assure prompt decisions on

> proposed demotions and removals. First, subsection (c) states that an agency may provide the employee with a notice period of more than 60 days only in accordance with regulations issued by the Office of Personnel Management. Second, an agency has a maximum of 30 days from the date the notice expires in which to issue a decision to retain, remove or demote an employee.

1978 U.S. Code Cong. & Admin. News at 2765.

Chief Justice Burger in *Rubin v. United States*, 449 U.S. 422, 101 S. Ct. 698, 66 L. Ed. 2d 633 (1981) held that when the terms of a statute are unambiguous, judicial inquiry is complete except in rare and exceptional circumstances. Justice White indicated that where the word, "shall" appears in a statutory directive, Congress could not have choosen stronger words to express its intent that the (specific action) be mandatory. *United States v. Monsanto*, 491 U.S. 600, 607, 109 S. Ct. 2657, 2662, 105 L. Ed. 2d 512 (1989) cited in *Plaut v. Spendthrift Farm Inc.*, 1 F.3d 1487 (6th Cir. 1993). Justice Thomas in *Connecticut National Bank v. Germain*, 112 S. Ct. 1146 (1992) stated that the Courts must presume that a legislature says in a statute what it means and means in a statute what it says there, citing *inter alia, Rubin, supra.*

The court of appeals erred in relying on *Brock* because its own prior decisions have delineated the consequences for the procedural violation of Chapter 43 Title 5 U.S.C. and the defenses afforded to employees as delineated in Chapter 77 Title 5 U.S.C. The court of appeals ignored the wording of 5 U.S.C.§ 4303(c)(1) by claiming Congress did not specify the consequences for failure to follow the law. The time limitation expressed in § 4303(c)(1) was clear and unambiguous and the

court of appeals knew or should have known that the consequences of failure to follow the law were delineated by Congress in Chapter 77 Title 5 U.S.C.

II.

WHETHER THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT ABUSED ITS DISCRETION AND DENIED DUE PROCESS BY FAILURE TO FOLLOW PRIOR SUPREME COURT DECISIONS IN *McCORMACK V. UNITED STATES*, 204 CT. CL. 371 (CT. CL. 1974); *YUNI V. MSPB*, 784 F.2D 381 (FED. CIR. 1986) [86 FMSR 7017]; *MORTON V. RUIZ*, 415 U.S. 199, 94 S. CT. 1055, 39 L. ED. 2D 270 (1974); *SERVICE V. DULLES*, 354 U.S. 363, 77 S. CT. 1152, 1 L. ED. 2D 1403 (1957); *CLEVELAND BOARD OF EDUCATION V. LOUDERMILL*, 470 U.S. 546 (1985); *UNITED STATES V. MONSANTO*, 491 U.S. 600, 607, 109 S. CT. 2657, 2662, 105 L. ED. 2D 512 (1989) AND IN ITS OWN DECISIONS IN *BARACCO V. DEPARTMENT OF TRANSPORTATION*, [83 FMSR 7021] (1983), *AFF'D*, 735 F.2D 488 (FED. CIR.) [84 FMSR 7028], *CERT. DENIED*, 469 U.S. 1018 (1984); *HANDY V. UNITED STATES POSTAL SERVICE*, 754 F.2D 335-38 (FED. CIR. 1985) [85 FMSR 7003); *LOVSHIN V. DEPT. OF NAVY*, 767 F.2D 826 (FED. CIR. 1985) [85 FMSR 7038], *CERT. DENIED*, 475 U.S. 1111 (1986) AND *SHIFLETT V. U.S. POSTAL SERVICE*, CIV. NO. 87-3391 (FED. CIR. FEB. 8, 1988) [88 FMSR 7008].

The court of appeals has previously held that: "It is well settled that valid regulations have the force and effect of laws" . . . and "An agency must follow all applicable procedures. *See McCormack v. United States*, 204 Ct. C1. 371 (Ct. C1. 1974); *Yuni v. MSPB* ,784 F2d 381 (Fed. Cir. 198) [86 FMSR 7017]; *Morton v. Ruiz*, 415 U.S. 199, 94 S. Ct. 1055, 39 L. Ed. 2d 270

(1974); *Service v. Dulles*, 354 U.S. 363, 77 S. Ct. 1152, 1 L. Ed. 2d 1403 (1957); cited in *Shiflett v. U.S. Postal Service*, 88 FMSR 7008. The agency did not follow the law, Chapter 43, Title 5 U.S.C., the OPM Regulation, 5 C.F.R.,§ 432.106 and the agency regulation AFR 40-452.

The court of appeals in *Shiflett, supra*, in ruling that the agency failed to provide notice of appeal rights held that it is well established that valid regulations have the force and effect of laws. The respondent does not contest the validity of the regulations in this case. There is no question but what respondent was required by law to comply with the regulations. This it wholly failed to do.

The Office of Personnel Management issued its regulation, 5 C.F.R. Part 432, and also placed a regulatory limitation on such actions. The OPM regulation provides for an extension of the notice period (§ 432.106(a)(4)(i)) and then directs:

> . . .The agency shall make its final decision within 30 days after expiration of the advance notice period.

(5 C.F.R. 432.106(b)). The Air Force also put restrictions on the regulatory authority to take a Chapter 43 removal in its regulation:

> (a) The notice period *expires absolutely* at the end of the 30 days UNLESS extended for no more than 30 additional days by authority of the MAJCOM or comparable organization, or, according to terms of a collective bargaining agreement. (The MAJCOM extension approval may be delegated to base level).

(Paragraph 5-4(c)(4)(a) AFR 40-452) (emphasis is in the regulation) and:

> . . .(a) The final decision will not be made until the day after the advance notice period expires but must be made within 30 calendar days after the expiration of the notice period. . . .

(Paragraph 5-4(c)(5) AFR 40-452).

The OPM and the agency followed the law established by Congress and directed in mandatory terms that the decision had to be issued within 30 days after the expiration of the notice period. It was acknowledged by the agency and the MSPB that the decision was issued after the time limitation had expired.

The court of appeals failed to answer its own question raised in *Handy, supra, i.e.*: Was the decision in its entirety in accordance with law? The decision was not in accordance with law because the time limitation had long expired.

The agency not only violated the law but also violated the OPM regulation and its own regulation by not issuing the decision within the time limitations. The Court of Appeals placed the burden of proving "harm" on Mr Diaz by stating the violation was a procedural violation to be considered under the "harmful error" criteria of § 7701(c)(2)(A). (App. B, 7a).

III.

WHETHER THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT AND THE MERIT SYSTEMS PROTECTION BOARD HAS EFFECTIVELY NEGATED THE CONGRESSIONAL MANDATE OF AFFIRMATIVE DEFENSES CONTAINED IN 5 U.S.C. § 7701(c)(2)(B) AND 5 U.S.C. § 7701(c)(2)(C)?

Long ago, the United States Supreme Court held that procedural rights are not second class rights. Their enforcement is essential to the preservation of substantive rights. *Anti-Fascist Committee v. McGrath*, 341 U.S. 123, 149 (1951) and, a court's duty to enforce an agency regulation is most evident when compliance with the regulation is mandated by the Constitution or federal law. *United States v. Caceres*, 99 S. Ct. 1465, 1470 (1979) cited in *Page v. Bolger*, 645 F.2d 227 (C.A. 4 1981).

Congress imposed a lesser burden on agencies effecting a Chapter 43 removal in that it had only to prove its case by substantial evidence (5 U.S.C. § 7701(c)(1)(A)) but provided "affirmative defenses" which holds that the agency decision may not be sustained if the employee shows: (A) harmful error in the application of the agency's procedures in arriving at such decision; (B) the decision was based on any prohibited personnel practice described in 5 U.S.C. § 2302(b) or; (C) shows that the decision was not in accordance with law. 5 U.S.C. § 7701(c)(2).

Congress has decreed that any employee who has the authority to take, direct others to take, recommend, or approve of any personnel action *shall not* with respect to such authority (5 U.S.C.§ 2302(b), emphasis added) — take or fail to take any other personnel action if the taking or failure to take such

action violates any law, rule, or regulation implementing, or directly concerning the merit system principles contained in section 2301. (5 U.S.C.§ 2302(b)(11)).

The agency regulation, Chapter 5, AFR 40-452 states:

> (a) The notice period expires absolutely at the end of the 30 days UNLESS extended for no more than 30 additional days by authority of the MAJCOM or comparable organization, or, according to terms of a collective bargaining agreement. (The MAJCOM extension approval authority may be delegated to base level.)
>
> (b) Further extension of the notice period can be approved only by OPM; and OPM has no statutory authority to extend a notice period that has expired. Accordingly, if the base or MAJCOM wants further extension, the request with justification, including the purpose and amount of time required, will be sent by the fastest method direct to: Appellate Polices Division, Office of Personnel Management, Room 7459, 1900 E Street NW Washington DC 20415.

Paragraph 5-4 AFR 40-452 and

> (a) The final decision will not be made until the day after the advance notice expires but must be made within 30 calendar days after the expiration of the notice period.

Par. 5-4(c)(5)(a) AFR 40-452.

The agency obtained no extensions and did not issue the decision in the time limitation directed by the law and regulations. Arguments that the action was negated by the obvious prohibited personnel practices and not being in accordance with law were dismissed as being without merit because the violation was simply a "procedural violation."

The MSPB held in *Baracco v. Department of Transportation*, 83 FMSR 7021, an adverse action under Chapter 75, which was affirmed by the court of appeals and writ denied by the Supreme Court that:

> . . . the "harmful error" standard is applicable in our review of an agency's failure to comply with a statutory procedure provided in 5 U.S.C. § 7513. . . .

and,

> In our view, the way to give meaning to both of these sections is to read the harmful errors provision as applicable to all procedural errors and to read not in accordance with laws provision as applicable to other unlawful actions.

then

> The Board concludes, therefore, that agency procedural errors in arriving at decisions in cases appealable to the Board are subject to review under the harmful errors standard of 5 U.S.C. § 7701(c)(2)(A).

In *Faust v. Smithsonian Institute*, 29 M.S.P.R. 496, 499 (1985) the Board stated:

> The Board has previously held that the notice requirements of 5 U.S.C. § 4303 are procedural in nature and subject to a harmful error analysis. *See Coltrane v. Department of the Army*, 25 M.S.P.R. 397, 403 (1984); *Sandland v. General Services Administration*, 23 M.S.P.R. 583, 590 n. 11 (1984) Thus, since appellant has failed to establish how the agency's failure caused substantial harm or prejudice to her rights, it does not constitute a basis for reversal of the agency action. *See Baracco v. Department of Transportation*, 15 M.S.P.R. 112 (1983), *aff'd*, 735 F.2d 488 (Fed. Cir. 1984).

In *Stephen v. Department of the Air Force*, [91 FMSR 5192] the Board modified its prior decisions reversing agency actions for "harmful error" based solely on the agency's failure to afford employees their statutory or regulatory procedural rights.

> The Board held, that when an appealable action against a nonprobationary federal employee has not been effected in accordance with the minimum procedures that satisfy the constitutional requirements of due process of law under *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 546 (1985) the action will be reversed because it cannot withstand constitutional scrutiny, rather than because the action

> constitutes harmful error. In this case the agency did not provide any of the procedural protections of 5 U.S.C. § 7513(b) nor did it provide the appellant with any other notice or opportunity to be heard. Thus the Board finds that the agency action must be set aside. *Ginocchi v. Department of the* Navy 92 FMSR 5126

The MSPB on May 5, 1993 decreed:

> . . . In a performance based action taken under 5 U.S.C. Chapter 43, the agency must prove all of the elements of its case, not just.the unacceptability of the appellant's performance by substantial evidence. This is so because the rights afforded appellants under Chapter 43 are substantive, not procedural. See e.g. *Griffin v. Department of the Army,* 84 FMSR 5867, reconsideration denied sub nom. *Northam v. Department of the Army,* 85 FMSR 5409; *Eibel v. Department of the Navy,* 857 F2d 1439 (Fed. Cir. 1988) [88 FMSR 7027]; *Weirauch v. Department of the Army,* 782 F2d 1560 (Fed. Cir. 1986) [85 FMSR 7007; *Sandland v. General Services Administration,* [84 FMSR 5871] Thus, the Board will not sustain any agency action taken under Chapter 43, even if the agency proves that the appellant's performance was unacceptable, if the agency does not prove the other elements of a Chapter 43 action, including that the appellant was given a reasonable opportunity to improve his performance. . .

Nafus v. Department of the Army, 93 FMSR 5163 (emphasis added).

On August 13, 1993 the MSPB decreed:

> . . . An agency action that is not in accordance with law may not be sustained. See 5 U.S.C. § 7701(c)(2)(C); An appealable action is unlawful in its entirety if there is no legal authority for it, and the Board will reverse it as "not in accordance with laws even if minimum constitutional due process was afforded to appellant and he has not shown harmful error, *i.e.* that the alleged error prejudiced his rights so that the outcome before the agency was possibly affected. . .

Hamilton v. U.S. Postal Service, 93 FMSR 5319 (citations omitted).

The court of appeals in denying the petition stated:

> . . . Under 5 U.S.C. §7701 (c) (2) (A) (1994), a decision of an agency must be reversed if the employee "shows harmful error in the application of the agency's procedures in arriving at such decision." In analyzing this statutory language, we have previously held that an employee challenging an agency action has the burden to prove that a violation of a statutory procedure was harmful. *Handy v. United States Postal Serv.*, 754 F 2d 335, 38 (Fed Cir 1985) ("It is insufficient simply to

> show that a statutory procedure was not followed at the agency level. Harmful error must be shown.").

(App. B, 7a). Argument put to the MSPB and the court of appeals was that the the agency committed prohibited personnel practices and the decision was not in accordance with law and must be reversed under 5 U.S.C.§ 7701(c)(2)(B) and § 7701 (c)(2)(C)

Violation of merit principles (5 U.S.C. § 2301) has been made a specific defense to appeals under Chapter 43 or Chapter 75 Title 5 U.S.C. Moreover that defense is a substantive one, not merely procedural. *Lovshin v. Dept. of Navy,* 767 F.2d 826 at 835-36 (Fed. Cir. 1985).

The court of appeals in *Lovshin* discussed the MSPB case of *Wells v. Harris,* 1 MSPB 199, 79 FMSR 7005, wherein the MSPB discussed prohibited personnel practices associated with § 4303 and noted that § 2302(b)(11) is the only provision of the Act referring to a law, rule or regulations implementing the merit system principles of § 2301 and that it would be difficult to find a law which is more clearly designed to give practical effect to merit system principle § 2301(b)(6) than § 4303(a).

The OPM regulation 5 C.F.R. Part 432 indicates that 5 U.S.C. § 4305 authorizes the Office of Personnel Management to prescribe regulations to carry out the purposes of Title 5 Chapter 43, including 5 U.S.C. § 4303 which covers agency actions to reduce in grade or remove employees for unacceptable performance (5 C.F.R. § 432.101). 5 C.F.R. Part 432 is clearly a regulation which implements the Merit Systems principles contained in Chapter 23 Title 5 U.S.C.

The agency regulation, AFR 40-452—Performance Management Program, is a regulation directly concerned with and implements the Merit System Principles contained in Chapter 23 Title 5 U.S.C. The regulation states in part;

> . . . When an employee's performance continues to be unacceptable after attempts to improve performance fail and reassignment or demotion is not feasible, there is no justification for retaining the employee. Removal from employment, based on unacceptable performance, is authorized by 5 U.S.C. 4303 and 5 C.F.R. Part 432 of the OPM regulations . . .

Paragraph 5-4(c)(3) AFR 40-452.

The agency regulation, AFR 40-452, directly implements the provisions of Chapter 43 Title 5 USC and the federal court in *Lovshin* supra, found that the merit principles of § 2301(b)(1), (2), (3), (6) and (7) were implemented by Chapter 43 Title 5 U.S.C. Any violation of the regulation (AFR 40-452) would be a prohibited personnel practice under 5 U.S.C. § 2302(b)(11).

5 U.S.C. § 2302(b)(11) makes it a prohibited personnel practice to:

> Take or fail to take any other personnel action if the taking of or failure to take such action violates any law, rule, or regulation implementing or directly concerning the merit system principles contained in section 2301 Title 5 U.S.C.

Paragraph 5-1(a) Air Force Regulation 40-452 directs:

> a. At any time during the performance appraisal cycle that the employee's performance in one or more critical elements becomes less than fully successful, the supervisor must inform the employee of the critical element(s) for which performance is unacceptable, in what way it is unacceptable, *and exactly what is required to bring it to a fulls successful level.* The supervisor will initiate an opportunity period to give the employee a reasonable time to demonstrate acceptable performance. This means an amount of time commensurate with the duties and responsibilities of the employee's position sufficient to allow the employee to show whether he or she can perform acceptably.

(Emphasis added).

Mr.. Diaz was simply advised to "take aggressive action to address and satisfactorily complete assigned taskings in accordance with management and/or regulatory established time frames", and "spend time more constructively addressing the taskings for which you have been assigned responsibility."

Failure to follow the provisions of Chapter 43, Title 5 U.S.C., the OPM Regulation (Part 432 C.F.R.) and the agency regulation (AFR 40-452) constituted a prohibited personnel practice under § 2302(b)(11) which negated the removal action pursuant to 5 U.S.C.§ 7701(c)(2)(B).

The agency regulation, AFR 40-452, provides that the notice period expires absolutely at the end of the 30 day unless

extended pursuant to the regulatory requirements for extension.

The MSPB has recognized that Chapter 43 Title 5 U.S.C. provides for greater protections for an employee before an action has been taken than he would be entitled to under Chapter 75, in return for the lessened burden of proof on an agency once the action is effected. *Sullivan v. Dept. of the Navy*, 90 FMSR 5268.

The court of appeals in *Shiflett, supra*, did not discuss the affirmative defenses provided in Chapter 77 Title 5 U.S.C. but simply held that the MSPB abused its discretion in denying a waiver on the time limitation for filing an appeal. In *Handy*, the court of appeals created the standard for reviewing a decision by the question; "Was the decision in its entirety in accordance with law?"

The court of appeals failed to address its own question in this case but simply relied on the previous decisions that all procedural violations must be considered under the harmful error criteria of § 7701(c)(2)(A) which places the burden on the employee to show that the decision would have been different if it had not been for the procedural violations.

CONCLUSION

Congress gave federal employees three "affirmative defenses" to counter improper agency personnel actions. (5 U.S.C.§ 7701(c)(2)(A),(B) and (C)). Use of two of the defenses have been negated by the court of appeals which held that an agency's violation of a statutory procedural requirement does not necessarily invalidate the agency action, especially where Congress has not expressed any consequences for such a procedural violation, (App. B, 3a)

and that an employee challenging an agency action has the burden to prove that a violation of a statutory procedure was harmful. (App. B, 7a).

The defenses of prohibited personnel practices (§ 7701(c)(2)(B)) and not in accordance with law (§ 7701(c)(2)(C)) also requires showing that the agency's action either violated any law, rule, or regulation implementing or directly concerning the merit system principles or that the decision was not in accordance with law. These defenses have been negated by the blanket rule that all procedural violations in law, rule or regulation will be considered under the "harmful error" rule of 5 U.S.C. § 7701(c)(2)(A) The MSPB has in a few rare instances, deviated from its blanket rule has ruled that procedural violations were not in accordance with law.

Congress explained the reasons for placing a specific time limitation on removals under Chapter 43 which was clear and unambigous; therefore the decision issued after the time limitation had expired was both a prohibited personnel practice under 5 U.S.C. § 2302(b)(11) and not in accordance with law. The writ of certiorari should be granted.

Respectfully submitted,

SHELBY W. HOLLIN
Attorney at Law
Counsel of Record
Attorney for Petitioner
7710 Stagecoach
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APPENDIX A — ORDER DENYING PETITION FOR REHEARING AND SUGGESTION FOR REHEARING IN BANC DATED OCTOBER 17, 1995

United States Court of Appeals for the Federal Circuit

95-3149

ISMAEL R. DIAZ,

Petitioner,

v.

DEPARTMENT OF THE AIR FORCE,

Respondent.

ORDER

A combined petition for rehearing and suggestion for rehearing in banc having been filed by the PETITIONER, and a response thereto having been invited by the court and filed by the RESPONDENT, and the petition for rehearing having been referred to the panel that heard the appeal, and thereafter the suggestion for rehearing in banc and response having been referred to the circuit judges who are in regular active service,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and the same hereby is, DENIED and it is further

ORDERED that the suggestion for rehearing in banc be, and the same hereby is, DECLINED.

Appendix A

The mandate of the court will issue on October 24, 1995.

FOR THE COURT,
FRANCIS X. GINDHART, CLERK

Dated: October 17, 1995

By s/ Diane M. Frye
Diane M. Frye
Chief Deputy Clerk

cc: SHELBY W. HOLLIN
TODD M. HUGHES

DIAZ V AIR FORCE, 95-3149
(MSPB — DA0432940286I-1)

Note: Pursuant to Fed. Cir. R. 47.6, this order is not citable as precedent. It is a public record.

APPENDIX B — INITIAL ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT AFFIRMING THE MSPB ACTION DATED AUGUST 21, 1995

United States Court of Appeals for the Federal Circuit

95-3149

ISMAEL R. DIAZ,

Petitioner,

v.

DEPARTMENT OF THE AIR FORCE,

Respondent.

Shelby W. Hollin, Attorney-At-Law, of San Antonio, Texas, argued for petitioner.

Todd M. Hughes, Attorney, Commercial Litigation Branch, Department of Justice, of Washington, D.C., argued for respondent. With him on the brief were *Frank W. Hunger*, Assistant Attorney General, *David M. Cohen*, Director and *Jeanne E. Davidson*, Assistant Director.

Appealed from: Merit Systems Protection Board

Appendix B

United States Court of Appeals for the Federal Circuit

95-3149

ISMAEL R. DIAZ,

Petitioner,

v.

DEPARTMENT OF THE AIR FORCE,

Respondent.

DECIDED: August 21, 1995

Before LOURIE, CLEVENGER, and SCHALL, *Circuit Judges*. CLEVENGER, *Circuit Judge*.

Ismael R. Diaz seeks review of a decision of the Merit Systems Protection Board (Board) Docket No. DA0432940286-I-1, in which the Board affirmed the Department of the Air Force's decision to remove Diaz from government service for unacceptable performance. We affirm.

I

Before his removal, Diaz was a GS-13 Chemist in the Directorate of Aerospace Fuels Management at Kelly Air Force Base, Texas. On January 28, 1993, the Air Force put Diaz on a performance improvement plan and notified him that his performance in one of his critical elements was unacceptable. On

Appendix B

April 16, 1993, the Air Force gave Diaz another notice that his performance was unacceptable and initiated a second performance improvement period. This notice also stated that Diaz's performance was deficient in another critical element. On October 26, 1993, Diaz was given a notice of proposed removal, and on February 2, 1994, the agency issued a final decision removing Diaz, effective February 11, 1994. Diaz appealed to the Board.

In an initial decision, the administrative judge (AJ) affirmed the Air Force's decision to remove Diaz. The AJ found that Diaz was given proper notice that his performance was unacceptable and was given ample opportunity to improve performance. The AJ then found that there was substantial evidence to support the agency's charge that Diaz's performance under the two critical elements was unacceptable. The AJ rejected Diaz's argument that his removal should be reversed because the time period between the notice of proposed removal and his actual removal was too long. The AJ acknowledged that, under 5 U.S.C. § 4303(c)(1) (1994), a decision regarding a proposed removal "shall be made within 30 days after the expiration of the notice period," but stated that Diaz's allegation of a procedural error was an affirmative defense analyzed under the harmful error analysis. The AJ found that Diaz did not allege any evidence to support his allegation that the error was harmful, and therefore the AJ concluded that the error could not be cause for reversal.

The initial decision became the final decision of the Board after the full Board denied Diaz's petition for review. Diaz then sought review in this court.

Appendix B

II

A decision of the Board must be affirmed unless we find it to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; obtained without procedures required by law, rule, or regulation having been followed; or unsupported by substantial evidence. 5 U.S.C. § 7703(c) (1994); *Holland v. Department of Air Force*, 31 F.3d 1118, 1120 (Fed. Cir. 1994).

Diaz argues that his removal was invalid because the Air Force's decision removing Diaz was issued more than 30 days after Diaz's notice period expired. Under 5 U.S.C. § 4303(c)(1), the decision to remove an employee "shall be made within 30 days after the date of expiration of the notice period." It is undisputed that Diaz was given notice of his proposed removal on October 26, 1993, triggering a notice period that expired on or around November 25, 1993. Additionally, it is undisputed that the agency's decision regarding the proposed removal was issued on February 2, 1994 — well over 30 days after the expiration of the notice period. Therefore, according to Diaz, his removal was achieved by erroneous procedures and should thus be reversed.

We must reject Diaz's argument. An agency's violation of a statutory procedural requirement does not necessarily invalidate the agency action, especially where Congress has not expressed any consequences for such a procedural violation. *See Brock v. Pierce County*, 476 U.S. 253, 259-60 (1986); *see also Kemira Fibres Oy v. United States*, No. 95-1077, slip op. at 10-13, 1995 U.S. App. LEXIS 20440 (Fed. Cir. Aug. 2, 1995). In the present case, the Board concluded that the failure to remove Diaz within the statutory period was a procedural error subject to harmful error analysis. The Board further found that Diaz failed to meet his burden of proving that he was harmed by the procedural error. We cannot find error in the Board's conclusions.

Appendix B

Under 5 U.S.C. § 7701(c)(2)(A) (1994), a decision of an agency must be reversed if the employee "shows harmful error in the application of the agency's procedures in arriving at such decision. In analyzing this statutory language, we have previously held that an employee challenging an agency action has the burden to prove that a violation of a statutory procedure was harmful. *Handy v. United States Postal Serv.*, 754 F.2d 335, 338 (Fed. Cir. 1985) ("It is insufficient simply to show that a statutory procedure was not followed at the agency level. Harmful error must be shown.").

The situation in the present case is analogous to that in the *Handy* case. In *Handy*, the petitioner argued that his statutory right, under 5 U.S.C. § 7513(b)(2), to make an oral reply to a proposed removal had been denied and thus his removal was not "in accordance with the law." We held that, since the petitioner made no effort to show that the procedural error affected the agency's decision, there was no basis for reversing the agency's decision. *Handy*, 754 F.2d at 337-38. In the present appeal, Diaz simply argues that his removal should be reversed because of the agency's failure to abide by the statutory time limit in 5 U.S.C. § 4303(c)(1). He did not argue or submit any evidence that showed that the agency's procedural violation affected the outcome of the agency's decision or was in any way harmful. Therefore, the Board properly declined to reverse the agency's decision to remove Diaz.

Diaz argues that the harmful error analysis in *Handy* does not apply in his situation because *Handy* involved a removal under 5 U.S.C., Chapter 75, whereas Diaz was removed under 5 U.S.C., Chapter 43. We must reject this argument. The statute pertaining to employee appeals of adverse actions to the Board, 5 U.S.C. § 7701 (1994), does not distinguish between removal actions under Chapter 75 and removal actions under Chapter 43. We see

no reason to apply the harmful error rule of 5 U.S.C. § 7701(c)(2)(A) to Chapter 75 removals and not to Chapter 43 removals. *See Martin v. Federal Aviation Admin.*, 795 F.2d 995, 999 (Fed. Cir. 1986) (applying the harmful error rule discussed in *Handy* to a Chapter 43 proceeding).

Diaz also argues that the Air Force did not adequately communicate the performance standards for his employment position and that the Air Force generally committed prohibited personnel practices. After carefully examining these arguments, we conclude that they are without merit.

Because the Board's decision is in accordance with the law and is supported by substantial evidence, that decision must be sustained.

No costs.

AFFIRMED

APPENDIX C — FINAL MERIT SYSTEMS PROTECTION BOARD ORDER DENYING PETITION FOR REVIEW DATED NOVEMBER 18, 1994

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

DOCKET NUMBER
DA-0432-94-0286-I-1

ISMAEL R. DIAZ,

Appellant,

v.

DEPARTMENT OF THE AIR FORCE,

Agency.

Shelby W. Hollin, Esquire, San Antonio, Texas, for the appellant.

Bernard Glavy, Esquire, Kelly Air Force Base, Texas, for the agency.

BEFORE

Ben L. Erdreich, Chairman
Jessica L. Parks, Vice Chairman
Antonio C. Amador, Member

Appendix C

ORDER

After full consideration, we DENY the appellant's petition for review of the initial decision issued on June 3, 1994 because it does not meet the criteria for review set forth at 5 C.F.R. § 1201.115. This is the Board's final order in this appeal. The initial decision in this appeal is now final. 5 C.F.R. § 1201.113(b).

NOTICE TO APPELLANT

You have the right to request further review of the Board's final decision in your appeal.

Discrimination Claims: Administrative Review

You may request the Equal Employment Opportunity Commission (EEOC) to review the Board's final decision on your discrimination claims. *See* 5 U.S.C. § 7702(b)(1). You must submit your request to the EEOC at the following address:

Equal Employment Opportunity Commission
Office of Federal Operations
P. O. Box 19848
Washington, DC 20036

You should submit your request to the EEOC no later than 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. *See* 5 U.S.C. § 7702(b)(1).

Discrimination and Other Claims: Judicial Action

If you do not request review of this order on your discrimination claims by the EEOC, you may file a civil action against the agency on both your discrimination claims and your

other claims in an appropriate United States district court. *See* 5 U.S.C. § 7703(b)(2). You should file your civil action with the district court no later than 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. *See* 5 U.S.C. § 7703(b)(2). If the action involves a claim of discrimination based on race, color, religion, sex, national origin, or a handicapping condition, you may be entitled to representation by a court-appointed lawyer and to waiver of any requirement of prepayment of fees, costs, or other security. *See* 42 U.S.C. § 2000e5(f); 29 U.S.C. § 794a.

Other Claims: Judicial Review

If you choose not to seek review of the Board's decision on your discrimination claims, you may request the United State Court of Appeals for the Federal Circuit to review the Board's final decision on other issues in your appeal if the court has jurisdiction. *See* 5 U.S.C. § 7703(b)(1). You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. *See* 5 U.S.C. § 7703(b)(1).

FOR THE BOARD: s/ Robert E. Taylor
Robert E. Taylor
Clerk of the Board

Washington, D.C.

APPENDIX D —INITIAL DECISION OF THE MERIT SYSTEMS PROTECTION BOARD AFFIRMING THE AGENCY'S REMOVAL ACTION DATED JUNE 3, 1994

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
DALLAS REGIONAL OFFICE

DOCKET NUMBER
DA-0432-94-0286-I-1

ISMAEL R. DIAZ,

Appellant,

v.

DEPARTMENT OF THE AIR FORCE,

Agency.

Shelby W. Hollin, Esquire, San Antonio, Texas, for the appellant.

Bernard Glavy, Esquire, Kelly Air Force Base, Texas, for the agency.

BEFORE

William W. Carnes
Administrative Judge

Appendix D

INITIAL DECISION

Ismael Robert Diaz appealed to the Board on February 12, 1994, from an action by the agency which removed him, effective February 11, 1994, for unacceptable performance. The Board has appellate jurisdiction over this timely-filed appeal. *See* 5 U.S.C. §§ 4301-4303. A hearing was conducted on this appeal at the appellant's request.

The appealed action is AFFIRMED.

ANALYSIS AND FINDINGS

The action was based on the appellant's failure to meet two critical elements of his position.

On October 26, 1993, T.R. Dunn, Chief of the Special Fuels Laboratory Branch, issued a notice to the appellant, a GS-13 Chemist in the Directorate of Aerospace Fuels Management at Kelly Air Force Base, Texas, advising him that he was proposing the appellant's removal for unacceptable performance. *See* appeal file, tab 6(4f). In this proposal, Dunn, the appellant's first-level supervisor, referred to the letter he had issued to the appellant on January 28, 1993, advising him that his performance was unacceptable in critical job element 3E, and allowing him a 60-day opportunity period to improve his performance.[1] *Id.*, tab 6(4iii). The proposal alleged that the appellant's unacceptable performance in critical element (CE) 3E continued during this 60-day PIP, and that his performance also became unacceptable in CE 4E. Thus, on April 16, 1993, the appellant was notified that his opportunity-to-improve period was extended to July 23,

1. This opportunity-to-improve period is also known as a performance improvement period (PIP).

1993. *Id.*, tab 6(4tt). The proposal charged that the appellant's performance remained unacceptable in both of these critical elements at the end of this second PIP and had not improved to an acceptable level in the three months after the PIP ended up to the time the proposal was issued. The proposal cited specific examples of the appellant's performance failures in each of these two elements. *Id.*, tab 6(4f).

The appellant made a written reply on November 16, 1993, to this proposal in which, *inter alia*, he asked that the Chief of the Technical Division, N.K. Makris, his second-level supervisor, recuse himself as the deciding official. *Id.*, tab 6(4d). On November 24, 1993, Colonel Grat H. Horn, Jr., the Director of Aerospace Fuels Management, granted the appellant's request and substituted himself as the deciding official. *Id.*, tab 6(4c). Horn issued the appellant a notice dated February 2, 1994, advising him that he agreed the appellant's performance in critical elements 3E and 4E was unacceptable, and it was his decision to remove the appellant from employment with the agency. *Id.*, tab 6(4b).

The agency must prove the elements of its action by substantial evidence.

An action based on unacceptable performance, pursuant to 5 U.S.C. Chapter 43, as here, must be sustained if the agency's decision is supported by substantial evidence.[2] 5 U.S.C. § 7701(c)(1)(A). As to one of the elements of the case, the parties stipulated that the agency's performance appraisal system

2. Substantial evidence is, "The degree of relevant evidence that a reasonable person, considering the record as a whole, might accept as adequate to support a conclusion, even though other reasonable persons might disagree." 5 C.F.R. § 1201.56(c)(1)(1994); *see also Parker v. Defense Logistics Agency*, 1 M.S.P.R. 505, 530-31 (1980).

applicable to the appellant was approved by the Office of Personnel Management (OPM).[3] *See* stipulation No. 4, in appeal file, tab 12; *Griffin v. Department of the Army*, 23 M.S.P.R. 657 (1984), *reconsideration denied, Nothman v. Department of the Army*, 29 M.S.P.R. 190 (1985).

The agency also must show that it communicated to the appellant the performance standards and critical elements of his position. *See Cross v. Department of the Air Force*, 25 M.S.P.R. 353, 357 (1984), *aff'd*, 785 F.2d 320 (Fed. Cir. 1985) (Table). The record shows that in October 1992 the appellant received and signed for the performance standards and critical elements for his position and, in addition, he stipulated that he was aware of them.[4] Appeal file, tabs 6(4ppp) and 12.

In order to prevail on a Chapter 43 action, the agency must establish that it advised the appellant that he was not meeting the performance standards for the critical elements in question and that it provided him a reasonable opportunity to demonstrate acceptable performance in those applicable elements. *See Sandland v. General Services Administration*, 23 M.S.P.R. 583 (1984). I find that the January 28, 1993 PIP notice advised the appellant that his performance was considered unacceptable in CE 3E.[5] The April 16, 1993 PIP notice included information about his performance continuing to be unacceptable in 3E, and

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3. The parties may stipulate to any matter of fact, and that stipulation satisfies the burden of proving that fact. 5 C.F.R. § 1201.63 (1994).

4. There are five elements under the appellant's performance plan; elements 1E, 3E, and 4E are designated as critical while 2E and 5E are non-critical. *See* appeal file, tab 6(4ppp).

5. Element 3E of the performance plan requires that the appellant "executes

(Cont'd)

also that it was now unacceptable in CE 4E.[6] This second PIP did not end until July 23, 1993. I find that the length of time involved in these PIPs afforded the appellant a reasonable time to improve his performance to an acceptable level in both CEs. *See, e.g., Wood v. Department of the Navy*, 27 M.S.P.R. 659, 663 (1985) (a 30-day PIP complies with the 5 U.S.C. § 4302(b)(6) requirement to provide a reasonable opportunity for improvement).

(Cont'd)
management directed tasks associated with the operation and management of the directorate, branch and/or laboratories as assigned." *See* appeal file, tab 6(4ppp). The kinds of tasks described under this CE are: investigates and responds to customer and management inquiries; performs inspections; processes waivers; directs the accomplishment of special studies/projects by the laboratories; prepares correspondence and reports; investigates and resolves problems; responds to audits; researches literature; provides training; schedules, attends and reports on meetings/conferences; collects/distributes information; conducts surveys and investigations; prepares and gives briefings; makes telephone surveys; reviews and updates publications; etc. There are two components under this element. Each one establishes the specific standards for tasks assigned from different levels of management — 3Sa covers tasks generated from the Branch or lower levels, while 3Sb pertains only to tasks generated at the Division or higher levels. *Id.*

6. Element 4E requires that the appellant "monitor the quality of laboratory testing and reporting operations for assigned categories of samples [the appellant's assigned category is lubricant and grease samples]." *See* appeal file, tab 6(4ppp). This CE involves maintaining a consolidated listing of laboratory test capabilities, product test requirements, and test attention times; reviewing test reports to assess lab compliance with applicable standards; maintaining a listing of testing and reporting deficiencies for each lab; directing actions to effect corrections; investigating related customer complaints, etc. This CE has two component standards — the first, 4Sa, requires examinations and inspections of lab test reports in assigned categories to ensure the lab testing and reporting operations are in strict compliance with established testing, reporting and formatting standards; 4Sb pertains to accuracy and the allowable testing and reporting errors detection requirements. *Id.* The appellant is charged only with failing to perform acceptably in 4Sa, thus, the 4Sb standard is not applicable to this action.

Appendix D

Additionally, Dunn issued the appellant an out-of-cycle performance appraisal, dated April 16, 1993, indicating that the appellant was not meeting his performance requirements in CEs 3E and 4E. *See* appeal file, tab 6(4rr). With that appraisal, he also gave the appellant a letter entitled "Performance Requirements and Milestones" which provided explanation and guidance regarding these two CEs. *Id.* at tab 6(4ss). These documents, along with the two PIP notices, as well as the performance standards themselves, clearly informed the appellant what was expected of him in relation to CEs 3E and 4E, and that he must improve his performance to the level of "meets" in these two elements in order for his performance to be rated acceptable.[7] The PIP notices did not increase or decrease the established requirements set by the performance standards for these two CEs, which had been in place since October 1992, and cross referenced those standards. *See* appeal file, tabs 6(4tt and 4iii).

I find that the agency has shown by substantial evidence that the appellant knew what his performance standards were, his performance was subsequently rated unacceptable, he was informed of his failure to meet these standards, and he was then afforded an opportunity to improve his performance, I find further that the appellant was clearly placed on notice that he would be evaluated under his regular performance standards during the PIPs. Accordingly, the agency has proven, by more than substantial evidence, that before this adverse action was

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7. Each of the elements under this performance plan allow for three rating levels: meets, fails to meet, or exceeds. *See* appeal file, tab 6(4ppp). The overall appraisal then provides for a summary rating of five levels: superior, excellent, fully successful, minimally acceptable, and unacceptable. *Id.* at tab 6(4rr). The fully successful level is when the employee meets the requirements of all elements under the plan. A fails-to-meet rating in any CE will result in an unacceptable rating on the appraisal overall. *Id.*

proposed it communicated to the appellant the performance standards by which his performance would be measured, notified him that his performance was unacceptable, and allowed him a reasonable opportunity to improve his performance.

The appellant claimed initially that his performance standards were not valid. However, other than contend generally that they did not conform with the requirements of 5 U.S.C. § 4302, he did not articulate any specific challenge to the validity of the standards used in this case. *See* appeal file, tabs 1, 8, and 9.

The standard for 3Sa specifies that whenever action items, suspenses, or other tasks are assigned or generated by the Branch or lower levels of management, the employee must complete them in "a timely, accurate and professional manner." *See* appeal file, tab 6(4ppp). The employee can fail on up to five occasions in a twelve-month period to satisfactorily perform and complete the assigned taskings within the established time frames and still meet this standard. Not timely completing or satisfactorily performing on more than five taskings during a twelve-month period will result in a failure of this standard. An exceeds rating is earned if all assigned tasks are completed and satisfactorily performed within the time frames established for each tasking, and superior levels of expertise and ingenuity are reflected in their accomplishment. *Id.*

Standard 3Sb covers action items, suspenses, and assigned tasks generated at the Division and higher level. This standard is met if the employee fails on no more than two occasions in a twelve-month period to satisfactorily perform and timely complete these taskings. The employee fails to meet this standard if more than two such Division or higher taskings are not satisfactorily performed or timely completed within the time

frames established for the assignment. Satisfactory and timely completion of all such taskings, with demonstrated superior levels of expertise and ingenuity, will net an exceeds for this standard. *Id.*

The third standard relied on by the agency in taking this action is 4Sa. To meet this standard, the employee must examine/inspect a representative sampling (one month's worth) of assigned sample test reports (for the appellant, the assigned area was lubricants and greases) from each of eight designated Area Fuels Laboratories at least once every twelve months and report these findings to SFTL on a quarterly basis.[8] Failure to complete two or more such required inspections or reports will cause a failure to meet this standard. Completion of more than the minimum required inspections and missing no testing or reporting deficiencies will earn an exceeds in standard 4Sa. *See* appeal file, tab 6(4ppp).

Considering the professional nature and grade of the appellant's position, I find that these performance standards are sufficiently precise and specific as to offer a general consensus to their meaning and content, and they are neither absolute nor vague. *See, e.g., Romero v. Equal Employment Opportunity Commission*, 55 M.S.P.R. 527, 534-37 (1992), *aff'd*, __ F.3d __ (Fed. Cir., March 15, 1994) (Table); *Donaldson v. Department of*

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8. The designation for the Directorate of Aerospace Fuels Management is SF; the Technical Division within that Directorate is known as SFT; within that Division, the Laboratory Branch is SFTL. Dunn is the Branch Chief for SFTL, which is located at Kelly AFB, where one of his staff employees is the appellant. There are 10 laboratories under SFTL, however, no labs are at Kelly, they are at various locations around the world. Each of the 10 labs is designated with a letter; *i.e.*, the lab at Wright-Patterson AFB, Ohio, is assigned the letter A, and is, therefore, SFTLA; lab F, or SFTLF, is in Mildenhall, England. *See* H.Exhs. 5 and 6, in appeal file, tab 13.

Labor, 27 M.S.P.R. 293 (1985). An agency is permitted to give content to performance standards by written and oral instructions, as long as they do not impose a stricter standard of performance than called for by the critical element. *See, e.g., Stone v. Department of Health and Human Services*, 38 M.S.P.R. 634 (1988); *Baker v. Defense Logistics Agency*, 25 M.S.P.R. 614 (1985), *aff'd*, 782 F.2d 1579 (Fed. Cir. 1986). The absence of a specific time limit for completion of tasks assigned under CE 3E does not make the standards under 3Sa and 3Sb invalid, since, as will be seen below, each task or suspense involved in these allegations of unacceptable performance included an assigned time frame for completion.

I find that substantial evidence shows that the performance standards at issue in this appeal permit an accurate evaluation on the basis of sufficiently objective performance criteria as to meet the requirements of 5 U.S.C. § 4302(b)(1). *See, e.g., Coleman v. Department of the Army*, 27 M.S.P.R. 305, 309 (1985); *Shuman v. Department of the Treasury*, 23 M.S.P.R. 620, 626 (1984). I find that they are valid.

Performance under Critical Element 4E

As previously explained, the performance standards under this CE are divided into two components. *See* note 6, *supra* at 4. The appellant's performance plan specifies that for any element having multiple standards, all of the standards under that element must be met to have a "meets" rating for that element. *See* appeal file, tab 6(4ppp, at p.4). It explains further that failure to meet any of the individual standards could result in an unsatisfactory rating. None of the elements in this performance plan have more than two standards or components. *Id.* The appellant did not challenge this weighting of the standards under the critical elements.

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The Board has held that a performance standard for a critical element may consist of more than one component, and that the incumbent may be required to perform acceptably with respect to each of them. *Shuman*, 23 M.S.P.R. at 627-28. Here, as set forth in *Shuman* at 629, the appellant was placed directly on notice in his performance plan that failure of one of the two standards under CE 4E would be a failure to meet that CE. Moreover, the second PIP notice, dated April 16, 1993, clearly advised the appellant that his performance under CE 4E was unacceptable due strictly to his failure to meet 4Sa. *See* appeal file, tab 6(4tt).

I find that a comparison of the component at issue, in relation to CE 4E overall, reveals that it is the more important of the two standards. This element addresses the appellant's responsibility to monitor the quality of the testing and reporting operations as to lubricants and greases in the various laboratories. Component 4Sa sets the standard for test report reviews and the appellant's requirement to report those findings, while 4Sb sets the standard for accuracy for these examinations. Thus, 4Sb is dependent on the examinations and reports of 4Sa taking place before there is anything to measure. I find that a failure of standard 4Sa properly warrants a failure of the CE as a whole. *See Shuman*, 23 M.S.P.R. at 628-29.

Under 4Sa, the appellant was required to review a one-month sampling of lubricant and grease test reports from eight of the ten laboratories,[9] at least once every twelve months, and report his findings to branch management (SFTL) at least quarterly. *See*

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9. The appellant's performance standard 4Sa did not require him to monitor the labs designated as SFTLE and SFTLH, at Vandenberg AFB and Cape Canaveral, respectively. These two labs were reviewed only by the chemist assigned the test area for environmental and waste samples. *See* appeal file, tab 6(4ppp).

appeal file, tab 6(4ppp). In order to meet this standard, the appellant could fail to perform no more than one required inspection or management report during the appraisal period. *Id.* In the proposal, the appellant was charged with unacceptable performance in CE 4E because, during the period of October 29, 1992, to October 26, 1993, the date the proposal was issued, he had not performed any of these test report reviews nor submitted any of the required quarterly reports to SFTL. *Id.*, tab 6(4f).

Dunn testified that, allowing for permissible failures in the performance standard, it meant the appellant was required to perform within a year at least seven inspections of lab reports and submit at least three quarterly reports to him. He said that the lab reports are on file at Kelly, and the chemists on his staff only have to examine and review those test results to prepare their report on the tests being conducted by the labs. Dunn explained that the other chemists in SFTL had the same performance requirement, each was responsible for a different area of sampling, and each of them completed their inspections and submitted their reports. Additionally, Dunn said that, due to the agency's emphasis on quality control, these inspections and reports were often discussed at staff meetings as a means to maintain high standards in the remote labs.

Dunn testified that, to remind the appellant to get these reviews and reports accomplished, he discussed this matter in counselling sessions and assigned specific taskings/suspenses number 105, and later number 109, which were instructions to the appellant to complete some of the reviews and submit the quarterly reports by January 15, 1993, and March 30, 1993, respectively.[10] See appeal file, tabs 6(4fff and 4jjj). He said that

10. Dunn explained that each time he gave a work assignment, action item, or task to an employee he assigned it a suspense number and generally a completion/ (Cont'd)

the appellant failed to submit any of these reports. Dunn said that when he counselled the appellant on this matter, the appellant claimed he lacked proper instructions and guidance to accomplish these tasks. At Dunn's request, Richard Redd, another chemist in SFTL at the time, prepared a check list in March 1993 on accomplishing these lab report inspections and standardizing the quarterly reports.[11] *See* H.Exh. 1. Redd testified that he distributed this memorandum to all SFTL chemists, including the appellant.

Dunn said that, despite Redd's memorandum, the appellant still turned in none of the quarterly reports, and he saw no indication that the appellant was doing any of the lab reviews. In April 1993, at the same time he issued the second PIP notice to the appellant, Dunn assigned the appellant two new taskings, number 712, which specified the appellant should perform test report reviews on laboratories A, B, and F and submit his report to Dunn; and item 713 which directed the appellant to perform the report reviews on labs C, D, and G and submit his report to Dunn. *See* appeal file, tab 6(4ss). Dunn testified that, when the proposal was issued, the appellant still had submitted none of these reports to the Branch and had done none of the test report reviews for any of

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suspense date. The taskings referred to in the proposal are identified by suspense numbers, some of which were assigned to the appellant on more than one occasion, but with new completion dates. *See, e.g.*, appeal file, tabs 6(4f, 4rr, and 4jjj); also H.Exhs. 4a and 4b. These two taskings, number 105 and 109, are listed only under the alleged failure to meet CE 4E, although since not completed by the appellant, they also could have been included in CE 3E. *See* discussion of 3E *infra*.

11. At that time, there were four chemists in SFTL. Each was assigned a product sampling area to review for their CE 4E. Just as the appellant had lubricant and grease samples, Redd was responsible for monitoring and reporting on lab tests for hydraulic fluid and chemical samples. *See* appeal file, tab 6(4ppp).

the various laboratories, nor did he do any of them before his removal in February 1994.

The appellant did not refute the testimony by Dunn nor any of the documentation of record regarding his failure to perform the requirements of CE 4E. Moreover, the appellant did not testify nor otherwise assert that he had completed these lab report reviews or submitted any reports required by 4Sa. I find that Dunn's undisputed testimony on this CE was credible, in part supported by memoranda and letters of record, and establishes that the appellant failed to perform any of the lab test report reviews in the area of lubricants and grease, and failed to submit any of the quarterly reports during the period of October 1992 to October 1993, as required by performance standard 4Sa.

Accordingly, I find that the agency has shown by substantial evidence that the appellant's performance did not meet the acceptable level of performance established by 4Sa, which is of such significance in relation to satisfactory performance of the overall element, that it warrants an unacceptable rating on this critical element as a whole. *See, e.g., Brown v. Veterans Administration*, 44 M.S.P.R. 635 (1990); *Sullivan v. Department of the Navy*, 44 M.S.P.R. 646 (1990); *Shuman*, 23 M.S.P.R. at 629. The charge of unacceptable performance as to CE 4E is sustained.

Performance under Critical Element 3E

The specific and detailed standards for each of the two components under CE 3E, which are 3Sa and 3Sb, are described above. *See also* note 5, *supra* at 4. To meet 3Sa the appellant was required to satisfactorily complete Branch or lower-level taskings/suspenses assigned to him, with no more than five failures to satisfactorily complete such assignments during a

twelve-month period. To meet 3Sb, he could fail in no more than two instances to satisfactorily complete Division or higher taskings/suspenses in a twelve month period. In the proposal, Dunn charged the appellant with failing to meet these standards and cited as examples of his unacceptable performance, ten Branch taskings and eight Division or higher taskings which he allegedly failed to satisfactorily complete during the period from October 29, 1992, to the issuance of the proposal on October 26, 1993. *See* appeal file, tab 6(4f). These eighteen taskings are listed in the proposal, and the agency limited its presentation of evidence on CE 3E to only these instances.

Most of these tasks (thirteen of the eighteen) are related to a project involving the Directorate's (SF's) goal of up-grading its ten laboratories around the world with modern equipment using the newest technologies, implementing improved testing methods, and reducing the size of test samples required. The SF Director, Col. Horn, testified that, in late 1991, the agency made the decision to aggressively pursue these goals, and he instructed the Technical Division (SFT) to have the Laboratory Branch (SFTL) go forward with this "automation and sample miniaturization" project. Horn said that, within the Branch, the appellant was assigned as this project manager.

N.A. Makris, the SFT Division Chief, testified that this project was considered critical because it would keep the agency's laboratories competitive with commercial laboratories performing similar work and would help ensure that this kind of testing continues to be an organic agency capability rather than have it become a commercial contract operation. He said that this project was delegated through SFTL to the appellant from the beginning. Makris testified that he frequently discussed the project with the appellant and had asked for monthly reports on the actions being taken and progress made. *See id.*, tab 6(4ttt).

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Makris explained that, by July/August 1992, the appellant had made very little progress on this project, so he discussed the matter in detail with the appellant, explaining its importance. He told the appellant that he expected him to aggressively research and categorize types of new technologies, including automated and micro-test equipment currently available, test and analyze it, determine what new equipment the labs needed, examine ways of improving test methods and sampling size reductions, make recommendations, and advise and assist the lab chiefs in getting the appropriate new equipment and technologies in place. Makris said that the appellant responded that he now understood the project and would "get right on it." *See* August 19, 1992 memorandum, appeal file, tab 6(4uuu). Makris said that he still observed the appellant doing very little on the project, he often made no reports at all and, when he did, he had essentially no progress to report. Makris felt a GS-13 professional like the appellant could easily accomplish this project without detailed instructions; however, he was aware that Dunn provided detailed instructions to the appellant and even placed him on a PIP, in an effort to get him moving.[12]

Dunn testified in detail at the hearing about each of the tasking examples the agency relied on in taking this action, and

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12. Makris testified that, in large part because of the lack of progress and aggressive pursuit of this automation/sample miniaturization project, he had to warn the Branch Chief, Dunn, that his performance on his CE involving supervision was not acceptable. He even put Dunn on a 60-day PIP in February 1993 in an effort to get him to properly supervise his staff to ensure that they were getting their assigned tasks and projects accomplished. Makris said that he felt Dunn responded accordingly, initiated appropriate supervisory actions, and showed sufficient improvement in his overall supervisory performance after completion of his PIP so as not to warrant any further action, as to Dunn. *See also* stipulations 6 and 7, appeal file, tab 12.

described what the appellant's performance deficiencies were with respect to each of them. He also assisted in the preparation of a hearing exhibit which is a summary of each of the applicable tasks, with cross-references to documentation in the file pertaining to his memoranda, instructions, and/or the appellant's responses to the various tasks. *See* H.Exh. 4a, in appeal file, tab 13. He explained that some of these numbered assignments involve essentially the same tasks, but where the appellant failed to complete the task by the suspense date, a new tasking/suspense was issued to the appellant with a new completion date.[13]

Dunn testified that the appellant failed in most of these instances to do anything or make any reports, or in some cases his responses were untimely and/or unsatisfactory, and this constituted unacceptable performance in relation to these specific tasks assigned to him. He said that as to tasking B-25 (the continuation of the original assignment of the project of automation of the testing operations/reduction of the testing sample volume requirements) the appellant failed to ever do any meaningful research, cataloging, assessing, or recommendations of any new equipment, technologies, testing methods or protocols, nor made any monthly reports of any significant progress, or to even prepare a plan of action.

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13. For example, tasking item B-25 (B for Branch), pertaining to "automation of testing operations/reduction of sample volume requirements" was a continuation of the previously assigned automation and miniaturization project, which required the appellant to make monthly reports on his progress. *See* proposal, para. 2a(1), in appeal file, tab 6(4f). In an effort to stimulate action on this project, separate taskings were subsequently assigned to the appellant on February 22, 1993, focusing the automation (B-343) and miniaturization (D-344) requirements to the limited area of JP8 fuel testing, with suspense dates of March 16, 1993. *Id.*, paras. 2a(3) and (4). Dunn explained that, when no actions or only unsatisfactory actions were taken on these taskings by the appellant, these tasks were reissued to the appellant on a later date, with new suspense numbers and/or completion dates. *See id., e.g.*, paras. 2a(5)-(8).

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In an effort to get something accomplished on this project, Dunn said that, in addition to frequently discussing the requirements and expectations of the project with the appellant, he assigned the appellant additional tasks consisting of smaller, simpler, and more focused segments of the overall project, with specific suspense deadlines. Assignment B-180 was a tasking to the appellant to concentrate on coming up with a plan for modernization of only one of the labs, SFTLD (in Mukilteo, Washington) as a prototype for the other labs, and continue to make monthly reports on this progress. Tasking B-343 was for the appellant to focus on what could be done to update and automate only the equipment used to test the aviation turbine fuel JP8. D-344 (D is for Division taskings) was an assignment involving the reduction or miniaturization of the volume of test samples of JP8 fuel only. *See* note 13 on p. 14, *supra*.

Dunn testified that, on several occasions, the appellant was given a specific assignment to give a briefing on the progress of his work on certain projects. Task D-703 was to brief Horn and Makris at a Directorate Management Review meeting on May 19, 1993, on his progress on test automation and sample miniaturization efforts. *See* appeal file, tab 6(4LL). Tasking B-719 was for the appellant to brief Dunn on July 2, 1993, on the implementation status of proposals for sample turbine fuel volume reduction; while B-720 was to brief Dunn on July 16, 1993, about progress on the test automation and miniaturization project. When the appellant failed to brief Dunn on either of these due dates in July, Dunn reissued these assignments to the appellant on July 27, 1993. *Id.*, tab 6(4q). Dunn said that he asked the appellant about these briefings in September, but the appellant told him he had nothing to report. Dunn testified that, because the appellant never did either of these briefings, his actions on B-719 and B-720 were totally unsatisfactory.

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Dunn acknowledged that the appellant gave a briefing at the Directorate Management Review meeting on May 19, 1993, as assigned in D-703, but he was not present to hear it. Dunn said that, nevertheless, he received verbal reports from Col. Horn and Makris that the appellant's briefing was inadequate, showed no progress, essentially failed to even address the program goals set in 1991, and showed that the appellant had not even formulated a plan of action to accomplish this project. Makris prepared a written memorandum to Dunn about this briefing, and reported that, at the briefing, the appellant became very argumentative with the Director about what the project should accomplish. *See* appeal file, tab 6(4kk).

Makris testified that he felt the appellant had actually made misrepresentations at the May 19, 1993 briefing, when he claimed the project "was well down the road" when he had nothing to report about new equipment or actions, subsequent to the 1991 commencement of this current modernization program. He said the appellant wanted to argue that the prior acquisition of equipment that had been done years before showed that he was working on the automation program. Horn testified that the appellant's May 19 briefing was inadequate because he reported no new information, had done no research on state-of-the-art equipment or up-dated technologies, and had no plans to move forward towards completion of their goals.

Dunn testified that he got very little or no reports on the status and efforts by the appellant and he saw no evidence that the appellant was taking appropriate actions to accomplish the various taskings pertaining to the overall laboratories automation/sample reduction project, the prototyping of Mukilteo Lab, up-dated automation of JP8 fuel testing, and the JP8 sample miniaturization project. He said that, in March 1993, the appellant made some effort to inventory the existing

equipment and test procedures in place at Mukilteo and MacDill labs and made a brief and inadequate report on this, but he did not research, list, or make recommendations regarding the newest available equipment, or changes in technology. *See* appeal file, tabs 6(4bbb and 4ddd). Dunn said that, notwithstanding his numerous explanations and written instruction to the appellant about what the tasks called for and the resources for information to accomplish these tasks, most of which was available in catalogs and other publications at Kelly, or readily available from the few manufacturers and vendors of this type of equipment, the appellant never reported on availability, capabilities, evaluations, or recommendations as to state-of-the-art test equipment that could potentially be used to modernize and update the labs. Dunn said that mainly what he got from the appellant was many excuses as to why he could not do what Dunn and Makris expected of him, and why he felt he had done enough in the past to count as satisfactory completion of these projects. *See* appeal file, tabs 6(4zz and 4uu).

Dunn attested that eventually, since he could not get an adequate report on B-343 and D-344 from the appellant, he personally prepared a report due to SFT on these projects. *See* appeal file, tab 6(4xx). He said that, on April 19, 1993, he gave a copy of that report to the appellant as a sample of what he expected from the appellant, the format he should use, and instructed the appellant to do an independent evaluation of that report as to Dunn's methodology and proposals.[14] Dunn said that,

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14. These tasks were number D-701, regarding the appellant's review and evaluation of Dunn's report as it pertained to turbine test fuel automation, and D-702, regarding turbine fuel sample miniaturization. *See* proposed removal notice, para. 2a(9), appeal file, tab 6(4f). These two tasks were assigned on April 19, 1993, and were originally due on April 30, 1993. Dunn said that, at the appellant's requests for more time to complete these two tasks, he extended the due dates to June 21, then

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rather than do his own research and data collection, the appellant asked Dunn to provide him with the data he had used to make his report. Dunn explained to the appellant that the idea behind these tasks was to see if the appellant independently came to the same assessments and conclusions so as to validate or recommend revisions to Dunn's proposals. He said that the appellant "strongly disagreed" when he refused to turn over his research data, even though he told the appellant where he had obtained it. The result was the appellant did nothing on taskings D-701 and D-702. *See* appeal file, tabs 6(4pp and 4oo).

Dunn explained that one task that came from Col. Horn, which was assigned to the appellant on April 19, 1993, was D-705. This involved the appellant assisting three of the labs in expediting the processing of remaining FY93 Defense Fuel Supply Center MIPR funding.[15] Dunn agreed that the appellant satisfactorily completed this task for two of the labs, but failed to complete the assignment regarding the MacDill Laboratory. He said that the MacDill situation involved the lab being unable to get a piece of equipment with the MIPR funds because the equipment was not on the Table of Allowances (TA) for MacDill. Dunn said that, as a GS-13 the appellant knew how to resolve this problem, and additionally, he repeatedly told the appellant to

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July 27, and then September 27, 1993, yet the appellant never submitted any report or evaluation of Dunn's report.

15. At the hearing, it was explained that MIPR stands for Military Interdepartmental Purchase Requests. The Defense Fuel Supply Center allocated certain funding, known as MIPR funds, to the various laboratories to purchase equipment and furnishings. Task D-705 involved the appellant assisting the labs at Searsport, Mukilteo, and MacDill in utilizing their remaining MIPR funds for that fiscal year, and to provide SFT and SFTL with monthly updates on this status.

contact the TA monitor to get the equipment added on that table so that it could be purchased before the funds expired. He said the appellant resisted, claiming that it was the lab chief's responsibility to do it. Dunn testified that, in June, he ordered the appellant to take the action to get the equipment on the TA, but he still would not do it. Subsequently, Dunn called the TA monitor himself, got the equipment authorized on the TA, and MacDill soon had the equipment in its inventory. He considered the appellant's inaction in the face of specific instructions demonstrated unsatisfactory completion of this task.

Another requirement that was given to SFTL from the Division was to perform a review and comparison of two publications, and report on the differences. This tasking was assigned to the appellant as D-709 on April 12, 1993. *See* appeal file, tabs 6(4w and 4ww). The appellant submitted a response dated May 26, 1993, *id.*, at tab 6(4ii), but Dunn advised the appellant that it was unsatisfactory because it did not compare the two publications, and was little more than a clerical and administrative review of only one of the documents, correcting such things as grammar and typographical errors. *Id.*, tab 6(4hh). Dunn said that he discussed this with the appellant and explained that he wanted a professional and analytical comparison of the procedures in the publications, but the appellant claimed that was what he had already done. *See id.*, tab 6(4gg). In order to get this task satisfactorily accomplished, Dunn assigned this task to one of the other chemists, Giles Laney, who completed a review satisfactory for Dunn's signature to forward to the Division. *See*, tab 6(4ff). Dunn testified that the appellant's actions and inactions on this tasking caused his performance on D-709 to be unsatisfactory.

Dunn testified that, after the Branch lost a GS-6 Management Assistant, he had to reassign some of the work

previously done by that person to the other Branch employees. On May 6, 1993, all of the chemists were assigned a portion of that redistributed work, and all except the appellant did theirs satisfactorily. *See id.*, tab 6(4nn). The appellant was given, as task B-715, the responsibility of preparing and processing the requirements relating to lube oil, hydraulic fluid, and base level fuels correlation programs. *Id.*

Dunn said that these reports were initially due from the appellant on July 23, 1993, for the second calendar quarter. Dunn acknowledged that, after he granted the time extensions requested by the appellant, the appellant satisfactorily completed that portion of B-715 pertaining to lube oil and hydraulic fluid, but he never did the base level fuels correlation report. Dunn said that the appellant failed to provide the quarterly reports on the base level fuels for all of 1993, and this was why the appellant failed to satisfactorily complete this B-715 tasking.

Dunn explained that another Directorate (LD) at Kelly was directed by the Environmental Protection Agency to identify all agency equipment that used ozone depleting chemicals (ODC), and an employee of LD requested SFTL to determine if certain testing equipment used in their labs used such substances. *See* appeal file, tab 6(4z). Dunn assigned the appellant this task, B-723. Dunn said that the appellant did not feel he should do this task, that it was not his job. He even attempted to send this "task" back to LD without doing anything on it on July 16, 1993, while acting as the Branch Chief in Dunn's absence. Dunn said that he felt this was an easy task for the appellant to accomplish, the information was needed, and he told the appellant on July 19, 1993, that, notwithstanding the opinion of some of the LD employees to the contrary, he expected the appellant to complete the task assigned him to check the specifications on the

equipment involved and report on any ODC used in the labs of SFTL.[16] *Id.*, tab 6(4w). Dunn testified that the appellant never completed this task.

Horn testified that as the head of the SF Directorate, he had repeatedly emphasized to all his employees the importance of what he called "general housekeeping." He said that he believed an orderly and uncluttered office and work area was very important to productive work. Dunn testified that, in keeping with this command guidance, he gave the appellant a specific task (B-700) to clean and straighten up his area because he felt the appellant's office was very cluttered and messy, and after one of the other employees left SFTL in about March of 1993, the appellant's clutter had expanded into that work area also. Dunn testified that the appellant had many obsolete periodicals around and other unneeded papers and materials, which he could have easily disposed of, and then organized his work area, yet, he never accomplished this. Dunn admitted that, eventually, the appellant made a little progress in this area, but it wasn't long before his clutter spread again. He felt the appellant never satisfactorily met this tasking requirement, notwithstanding his many counsellings with the appellant on this subject and extensions of suspense dates.

The appellant did not refute most of the testimony regarding these taskings discussed above. He did repudiate some of the

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16. A nonsupervisory employee of LD, Diane Roche, testified that LD had set up a task force to identify equipment that uses ODC, and she felt the LD employee who had asked Dunn to have his Branch provide ODC information on their equipment was "out of line." She and Dunn both testified about a "heated" discussion they had about this on July 19, 1993. Roche felt the appellant properly "returned" this task to LD; however, Dunn contended that it was his responsibility to assign work to his employees and this task was something he expected the appellant to complete.

instances of alleged unacceptable performance as to several of the taskings, but he also corroborated some of the facts relied on by the agency in supporting its claims of unsatisfactory performance regarding these tasks. Basically, the appellant attested, without providing many specifics, that he did whatever was assigned to him and that, no matter what he did, Dunn and Makris would not be satisfied with his work.

The appellant acknowledged that he was tasked as the manager for the project of automation and miniaturization of the labs using state-of-the-art equipment and new technologies. He confirmed the availability of resources in catalogs (such as the "Fisher Catalog"), publications, and from manufacturers and vendors of equipment, and acknowledged that, to some extent, these resources aided in assessment of equipment capabilities. He contended, however, that these catalogs were little more than "wish lists" and often the equipment would not do what it was supposed to do. He opined that the technology and hi-tech equipment that management wanted was not yet available and, basically, that the goals set in this area were impossible.

The appellant did not explain how he made this determination, or why he did not prepare a report to his supervisors detailing with specific data and assessment results how he reached this "conclusion"; thus, leaving the impression that this was little more than his supposition. In his testimony, it was obvious that the appellant disagreed with the feasibility of the overall project, and perhaps still did not understand its objectives. He continued to assert that whenever he reported that many items of automated testing equipment were already in the lab system, he was not allowed "credit" for these efforts in relation to his progress on this automation project.

I find that the appellant's primary failure regarding the tasks

relating to the automation and miniaturization project, including the subsequent tasks limiting the focus on only one product or type of testing, was his failure or refusal to prepare the applicable reports demonstrating that he had reviewed, categorized, tested, assessed, and made recommendations based on his findings, including recommendations of what potential equipment or test procedures, if any, that might be utilized in the labs to meet the agency goals set in 1991 to improve automation and reduce test sample volumes. If his claim that the agency's goals are unattainable is correct, and he had actually done the research and analysis, he should have been able to prepare the necessary reports properly documenting this assertion with applicable facts and data.

Regarding task D-701, where Dunn assigned the appellant to evaluate the report Dunn had prepared for Division on aviation turbine fuel test automation and miniaturization, *see* appeal file, tab 6(4xx), supposedly because the appellant had failed to do his tasks on this subject, the appellant essentially corroborated Dunn's testimony. He said that he asked Dunn for the background data he had used, but Dunn refused to provide it to him. The appellant admitted Dunn told him that he expected the appellant to do his own research to independently validate the proposals and conclusions Dunn had set forth in that report. The appellant claimed that he was unable to get the data necessary to verify Dunn's figures, but he did not say that he ever provided a report or written evaluation of Dunn's report.

The appellant concurred with Dunn and Makris that he was a GS-13 professional and, therefore, he did not need detailed instructions when given an assignment, only guidance as to what his assignment was. He did not, however, adduce any significant evidence to refute the credible evidence presented by the agency

relating to the particular eighteen taskings discussed above and relied on by the agency to determine he failed to meet the performance standards under CE 3E.

I find that the credible testimony from Dunn, Makris, and Horn provided substantial evidence of performance deficiencies by the appellant in relation to these specific instances covered by the removal notice. *See Wallace v. Department of the Air Force*, 879 F.2d 829, 833 (Fed. Cir. 1989). I find there is sufficient probative evidence to meet the substantial evidence standard to establish that the appellant failed to satisfactorily or timely complete at least ten branch-level tasks assigned to him during the one year preceding the proposed removal, and this fails to meet the performance standard 3Sa. I find there is substantial evidence that the appellant failed to satisfactorily complete eight division or higher-level taskings during this same year, and this represents a failure also of standard 3Sb.

From my examination of the evidence overall, as it pertains to this CE, I find that there is substantial evidence to support a conclusion that the appellant failed to meet the acceptable level of performance for both performance components of this element. *See, e.g., Brown*, 44 M.S.P.R. 635; *Sullivan*, 44 M.S.P.R. 646. The charge of unacceptable performance in CE 3E is sustained.

The appellant failed to establish that the agency committed harmful error.

The appellant alleged that his removal action should be reversed because the agency waited too long before issuing its decision on the proposed removal for unacceptable performance, letting the maximum period of time permitted by 5 U.S.C.

§ 4303(b) expire.[17] He alleged also that the agency failed to comply with its own regulations by failing to consider him for reassignment or demotion before resorting to removal. Both of these allegations constitute claims of harmful procedural errors, and thus are affirmative defenses under 5 U.S.C. § 7701(c) (2) (A).[18] The appellant bears the burden of proof on all affirmative defenses, by a preponderance of evidence.[19] *See* 5 C.F.R. § 1201.56 (1994). In order to establish harmful error, the appellant must prove first that, in taking the action on appeal, the agency committed error in the application of its procedures, and then, if there was error, that in the absence or cure of that error it would likely have caused a different outcome in the action. *See, e.g., Coughlan v. Department of the Air Force*, 35 M.S.P.R. 230 (1987); *Parker*, 1 M.S.P.R. at 513; 5 C.F.R. § 1201.56 (1994).

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17. Under 5 U.S.C. § 4303(b)(1)(A) an employee who receives a notice of proposed removal or demotion for unacceptable performance is entitled to "30 days' advance written notice." That statute further provides, however, that an agency, by its own regulations, may extend this 30-day notice period "for not more than 30 days" Extensions beyond this first 30 day extension can only be done in accordance with regulations issued by the Office of Personnel Management (OPM). 5 U.S.C. § 4303(b)(2). The decision on such a proposal "shall be made within 30 days after the expiration of the notice period." *Id.* at § 4303(c)(1).

18. The appellant alleged that his claim that the agency exceeded the notice requirements set forth in 5 U.S.C. § 4303 is an affirmative defense in violation of the law, rather than harmful error. This issue has previously been resolved by the Board, however, and it was determined that a violation of these notice requirements can be the basis for reversing an agency action only if harmful error is proven. *See, e.g., Faust v. Smithsonian Institution*, 29 M.S.P.R. 496, 499 (1985).

19. A preponderance of the evidence is that degree of relevant evidence that a reasonable person, considering the record as a whole, would accept as sufficient to find that a contested fact is more likely to be true than untrue. *See* 5 C.F.R. § 1201.56(c) (2) (1994).

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Under the provision of the agency's regulations covering adverse actions based on unacceptable performance, *see* AFR 40-452 (July 1, 1984), supervisors are instructed to consider reassignment or demotion as a possible means of resolving an unacceptable performance situation. *See* para. 5-4(1)- (3), appeal file, tab 1, attach. D. The regulation provides, however, where attempts to improve an employee's performance fail, "and reassignment or demotion is not feasible, there is no justification for retaining the employee," and removal under chapter 43 is authorized. *Id.*

It is obvious that the regulation does not require demotion or reassignment in lieu of removal, but only management consideration of those options as possible alternatives to the removal. The proposing official, Dunn, and the appellant's second-level supervisor, Makris, testified that they looked at the possibility of a reassignment or demotion before the removal was initiated, but found these options did not offer a feasible solution. Dunn said that, during the months before he issued the removal proposal, he looked at the possibility of reassignment or demotion of the appellant, but felt he was not qualified to competently perform any of the chemists positions at Kelly, and after discussing it with Division Chief Makris, he decided it was not a feasible alternative to removal.

Makris confirmed that he and Dunn discussed these options, and he concurred that reassignment and demotion were not feasible. Makris said that he contacted other organizations on base trying to locate a vacant position for possible placement of the appellant, but without success. He said that based on his knowledge of the appellant's performance and the needs of his division, he determined that a demotion would not resolve the problem of the appellant's unacceptable performance. He

supported Dunn's decision to propose removal as the only feasible alternative in this case.

There is no evidence in this case of the availability of vacant positions within the SF organization or other organizations at Kelly. The unrefuted evidence shows that the appellant's supervisors complied with the regulatory guidance to consider demotion and reassignment before proposing an employee's removal for unacceptable performance. Moreover, the evidence shows that, before he proposed the appellant's removal, Dunn determined that reassignment or demotion of the appellant because of his poor performance was not feasible. I find that the appellant has failed to show the agency committed any procedural error in relation to its regulatory requirement to consider these alternatives prior to initiating a removal action.

Concerning the expiration of the notice period, the decision notice of February 2, 1994, was issued more than ninety days after the October 26, 1993 proposal was issued. In addition to the statutory time limits of 5 U.S.C. § 4303, *see* note 17 on 24, *supra*, the applicable agency regulation specifies that the notice period expires at the end of the thirty-days notice given in the proposal, "unless extended for no more than 30 additional days by authority of MAJCOM," with further extensions granted only by the terms of a collective bargaining agreement or by OPM. *See* AFR 40-452, 5-4, (4)(a) and (b), appeal file, tab 1, attach. D. The agency stipulated that no one at Kelly AFB requested an extension of time to this notice period, and no one at MAJCOM requested an extension of the notice period from OPM.[20]

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20. OPM's regulations concerning extensions of the notice period in adverse action based on unacceptable performance are set forth in 5 C.F.R. § 432.107(a)(4)(i)(B) (1993). None of the situations in which those regulations allow an extension to the notice period are applicable in this case. *Id.* Consistent

(Cont'd)

Based on these undisputed facts, it is clear that the appellant's advance notice period expired after thirty days. Without any extension to that notice period, the agency should have issued its decision on the proposal not later than thirty days after the time, or sixty days after October 26, 1993, which was December 25, 1993. Thus, the agency failed to follow the procedures regarding the notice period as set forth in 5 U.S.C. § 4303 and 5 C.F.R. § 432.107. Even though the agency committed error by this delay, it is subject to the harmful error analysis. *Faust*, 29 M.S.P.R. at 499.

The deciding official, Col. Horn, testified that, on November 16, 1993, when the appellant submitted his response to Dunn's proposal, he requested that Makris not be the deciding official on his proposed removal, because he believed Makris could not be objective in his case. *See* appeal file, tab 6(4d). Since Makris had been slated to be the deciding official, it was passed on to the next level of supervision, Horn. Horn said that he travels about 50% of the time, this was a difficult case and required study of considerable documentation, it fell around the Christmas season, and he just was not able to spend the necessary time for him to make his decision on this case any sooner.

The evidence was undisputed that the appellant remained at work, as normal, with full benefits, pay, and regular work duties during the interim. Horn opined that this extra time actually was to the appellant's benefit because, had there been evidence presented to him during the period before he made his decision that showed the appellant's performance had improved, he would not have removed the appellant. But none was presented, and he

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(Cont'd)

with 5 U.S.C. § 4303(c), OPM's regulations also require that the agency shall make its final decision within 30 days after expiration of the advance notice period. 5 C.F.R. § 432.107(b)(1993).

observed no improvement in the appellant's performance. Horn admitted that when he issued his decision, he was unaware there were time restrictions for getting the decision notice issued.

The appellant contended that since no decision was issued within the time established by 5 U.S.C. § 4303, Horn had no authority to issue a decision and the action should be reversed. He offered no evidence nor any assertion of how he was harmed by this agency delay. I find no evidence to support a conclusion that the agency was likely to have reached a different conclusion, even if the decision had been issued within the proper time period. Likewise, there is no evidence to support an inference that the appellant was harmed in any way or that his rights were prejudiced by the agency's delay in issuing the decision notice. *See, e.g.*, 5 C.F.R. § 1201.56(c)(3) (1994). Accordingly, I find that the appellant has failed to show that the agency error was harmful.

The appellant has not shown that his removal was based on discrimination due to his national origin.

The appellant alleged that the agency action was discriminatory on the basis of national origin — he is Hispanic. This allegation is also an affirmative defense and, if true, would constitute a prohibited personnel practice. *See* 5 U.S.C. §§ 7701(c)(2)(B), 2302(b)(1). In order to establish a prima facie case of prohibited discrimination,[21] the appellant must show that

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21. On discrimination claims, the Board follows generally the evidentiary test described by the Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). The appellant must establish a prima facie showing of discrimination; then the burden shifts to the agency to articulate a legitimate nondiscriminatory basis for the action; and then, if appropriate, the appellant must prove that the agency's articulated reason is merely a pretext for discrimination. *See also St. Mary's Honor Center v. Hicks*, 113 S.Ct. 2742 (1993).

he is a member of a protected group, which he is; that he was similarly situated to others who are not members of his protected group or class; and that he was treated more harshly and disparately than one or more of those similarly situated individuals. *See, e.g., Combs v. United States Postal Service*, 41 M.S.P.R. 304, 308 (1989). He must also establish that the difference in treatment was based upon an intent to discriminate because of his national origin. *See, e.g., Fenn v. Department of the Army*, 35 M.S.P.R. 362, 366 (1987).

The appellant presented no evidence or argument of similarly situated employees in non-Hispanic groups that were treated differently. He testified that Hispanics rarely got any awards, and notwithstanding that his Branch was the largest in the Directorate, no awards were given to SFTL employees before Vasil Laney, a female, came to their Branch. He adduced no evidence that would support a finding that his removal was in any way due to the fact that he is Hispanic. I find no evidence in the record suggesting any disparate treatment in relation to this removal on the basis of national origin. I find that he has failed to establish a prima facie case of discrimination.

An appellant's bare allegation of discrimination, unsupported by probative and credible evidence, does not prove an affirmative defense. *See, e.g., Mascol v. Department of the Navy*, 7 M.S.P.R. 565 (1981); *Sorrells v. United States Postal Service*, 6 M.S.P.R. 29 (1981). Accordingly, I find that the appellant has not established discrimination on the basis of national origin.

The appellant has not shown that this action was taken against him in reprisal for any protected activity.

The appellant alleged that he was removed in reprisal for having previously filed discrimination (EEO) complaints. This is

another affirmative defense which, if true, could constitute a prohibited personnel practice. *See* 5 U.S.C. §§ 7701(c)(2)(B), 2302(b)(1) and (9). In order to establish reprisal for engaging in a protected activity, such as filing an EEO complaint, an appellant must show (1) that he engaged in the protected activity, (2) that the deciding official knew about the activity, (3) that the appealed action could have, under the circumstances, been retaliation, and (4) that there was a genuine nexus between the retaliation and the action taken. *See Warren v. Department of the Army*, 804 F.2d 654 (Fed. Cir. 1986).[22]

The parties stipulated that the appellant had filed EEO complaints in the past, and that Horn, Makris, and Dunn were aware of these complaints. *See* appeal file, tab 12. The appellant had apparently filed several complaints over the years against Dunn and Makris, the latest regarding the unsatisfactory performance evaluation they issued to him in April 1993. There was no evidence, however, that any of the appellant's prior complaints alleged discrimination by Horn.

These stipulated and undisputed facts establish the first two parts of the reprisal test. Because the appellant's filing of these complaints was protected conduct, and it occurred prior to the issuance of the notice of proposed removal, it is possible that this action could have been in reprisal for one or more of his prior EEO complaints. Nevertheless, to prevail on such an affirmative defense, the appellant must establish by preponderant evidence that such unlawful reprisal played a significant or substantial role

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22. Although Warren involved a case of alleged reprisal for whistleblowing, under 5 U.S.C. § 2302(b)(8), the Board has also utilized this analytical test for claims of reprisal for other protected activities, such as filing a discrimination complaint, protected by 5 U.S.C. § 2302(b)(9). *See, e.g., Rockwell v. Department of Commerce*, 39 M.S.P.R. 217, 222 (1988).

in the decision to remove him. Even then, an agency will prevail if it shows by preponderant evidence that it would have taken the same action even if the protected conduct had not occurred. *E.g., Spadaro v. Department of the Interior*, 18 M.S.P.R. 462 (1983); *Gerlach v. Federal Trade Commission*, 9 M.S.P.R. 268 (1981).

The appellant offered essentially no evidence to support a finding of a genuine nexus or causal connection between Horn and his decision to remove him and his prior EEO complaints. He testified that, right after Horn came to the Directorate as its Director in mid-1991, he went to Horn and advised him that there was a "hostile environment" in the Lab Branch, but he did not adduce any testimony that would support his claim of a retaliatory motive by his supervisors because he had previously filed complaints against them. Diane Roche, the employee of another directorate who testified about the task involving the ozone depleting substances, attested that it was her observation that Dunn did not like the appellant and that the appellant did not like Dunn, due to what she characterized as a "personality conflict." No testimony from any witnesses nor any other evidence, however, suggested any basis to infer a retaliatory motive against the appellant by Dunn or any other supervisor.

There was no evidence or assertion that Horn harbored any retaliatory motive against the appellant for his complaints against Dunn and Makris. While the lack of a retaliatory motive by the deciding official may not be conclusive proof that a removal was not taken, at least in part, because of protected activity, it strongly militates against such a finding. *See Walsh v. Environmental Protection Agency*, 25 M.S.P.R. 460, 468-69 (1984) (Impure motive by only a recommending official cannot be presumed to taint the deciding official's determination on the merits).

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I find that the appellant has failed to provide sufficient probative and credible evidence to establish a causal connection or genuine nexus between his protected activity of having filed prior EEO complaints and the agency's decision to propose and effect this removal action. Thus, he has not shown reprisal under the *Warren* test. Moreover, I find that, even if an inference is assumed that the appellant's prior complaints played some part in this removal, there is sufficient evidence of unacceptable performance by the appellant to conclude that the agency would have taken this removal action absent any retaliatory motive. Accordingly, I find the appellant has not established the affirmative defense of reprisal under 5 U.S.C. § 2302(b)(9).

Unacceptable performance in a single critical element supports a removal action.

The law provides that unacceptable performance by an employee in even one critical element is sufficient to justify either a demotion or a removal action. 5 U.S.C. §§ 4301(3), 4303(a). Once the employee's performance is shown by substantial evidence to be unacceptable in a CE, the Board has no authority to review the agency's choice to impose a removal. *See, e.g., Lisiecki v. Federal Home Loan Bank Board*, 23 M.S.P.R. 633 (1984), *aff'd*, 769 F.2d 1558 (Fed. Cir. 1985), *cert. denied*, 475 U.S. 1108 (1986). I have found substantial evidence that the appellant's performance was below an acceptable level in two critical elements. Thus, I find that the agency has shown by the requisite standard that it properly removed the appellant for unacceptable performance under 5 U.S.C. § 4303.

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DECISION

The agency's action is AFFIRMED.

FOR THE BOARD

s/ William W. Carnes
William W. Carnes
Administrative Judge

NOTICE TO APPELLANT

This initial decision will become final on JUL 08 1994, unless a petition for review is filed by that date or the Board reopens the case on its own motion. This is an important date because it is the last day on which you can file a petition for review with the Board. The date on which the initial decision becomes final also controls when you can file a petition for review with the Equal Employment Opportunity Commission (EEOC) or with a federal court. The paragraphs that follow tell you how and when to file with the Board, the EEOC, or the federal courts. These instructions are important because if you wish to file a petition, you must file it within the proper time period.

BOARD REVIEW

You may request Board review of this initial decision by filing a petition for review. Your petition for review must state your objections to the initial decision, supported by references to applicable laws, regulations, and the record. You must file your petition with:

The Clerk of the Board
Merit Systems Protection Board
1120 Vermont Avenue, NW., Suite 802
Washington, DC 20419

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If you file a petition for review, the Board will obtain the record in your case from the Administrative Judge and you should not submit anything to the Board that is already part of the record. **Your petition must be postmarked or hand-delivered no later than the date this initial decision becomes final. If you fail to provide a statement with your petition that you have either mailed or hand-delivered a copy of your petition to the agency, your petition will be rejected and returned to you.**

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION REVIEW

If you disagree with the Board's final decision on discrimination, you may obtain further administrative review by filing a petition with the EEOC no later than 30 calendar days after the date this initial decision becomes final. The address of the EEOC is:

Equal Employment Opportunity Commission
Office of Federal Operations
P.O. Box 19848
Washington, D.C. 20036

JUDICIAL REVIEW

If you do not want to file a petition with the EEOC, you may ask for judicial review of both discrimination and nondiscrimination issues by filing a civil action. If you are asserting a claim under the Civil Rights Act or under the Rehabilitation Act, you must file your appeal with the appropriate United States district court as provided in 42 U.S.C. § 2000e-5. If you file a civil action with the court, you must name the head of the agency as the defendant. *See* 42 U.S.C. § 2000e-16(c). To be

timely, your civil action under the Civil Rights Act, 42 U.S.C. § 2000e-16(c) must be filed no later than 30 calendar days after the date this initial decision becomes final. If you are asserting a claim under the Age Discrimination in Employment Act, your claim must be filed with the appropriate United States district court as provided in 29 U.S.C. § 633a(c). You may have up to 6 years after the right of action first accrues in which to file such a civil action. *See* 28 U.S.C. § 2401(a).

If you choose *not* to contest the Board's decision on discrimination, you may ask for judicial review of the nondiscrimination issues by filing a petition with:

The United States Court of Appeals
for the Federal Circuit
717 Madison Place, NW.
Washington, DC 20439

You may not file your petition with the court of appeals before this decision becomes final. To be timely, your petition must be *received* by the court of appeals no later than 30 calendar days after the date this initial decision becomes final.

NOTICE TO AGENCY/INTERVENOR

The agency or intervenor may file a petition for review of this initial decision in accordance with the Board's regulations.

CERTIFICATE OF SERVICE

I certify that the attached Document(s) was (were) sent by regular mail, unless otherwise indicated below, this day to each of the following:

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Appellant

Mr. Ismael R. Diaz
7723 Bent Branch
San Antonio, TX 78250-3023

Appellant's Representative(s)

Shelby W. Hollin, Esq.
7710 Stagecoach
San Antonio, TX 78227

Agency's Representative(s)

Bernard Glavy, Esq.
SA-ALC/JAE
204 Lombard Drive
Kelly AFB, TX 78241-5609

Other

Marjorie Marks
U.S. Office of Personnel Management
Employee Relations Division
1900 "E" Street, N.W., Room 7412
Washington, DC 20415

June 3, 1994
(Date)

s/ Susan M. Vatalaro
Susan M. Vatalaro
Legal Assistant

APPENDIX E — STATUTES INVOLVED

CHAPTER 23 — MERIT SYSTEM PRINCIPLES

§ 2301. Merit system principles

(a) This section shall apply to —

(1) an Executive agency; and

(2) the Government Printing Office.

(b) Federal personnel management should be implemented consistent with the following merit system principles:

(1) Recruitment should be from qualified individuals from appropriate sources in an endeavor to achieve a work force from all segments of society, and selection and advancement should be determined solely on the basis of relative ability, knowledge, and skills, after fair and open competition which assures that all receive equal opportunity.

(2) All employees and applicants for employment should receive fair and equitable treatment in all aspects of personnel management without regard to political affiliation, race, color, religion, national origin, sex, marital status, age, or handicapping condition, and with proper regard for their privacy and constitutional rights.

(3) Equal pay should be provided for work of equal value, with appropriate consideration of both national and local rates paid by employers in the private sector, and appropriate incentives and recognition should be provided for excellence in performance.

(4) All employees should maintain high standards of integrity, conduct, and concern for the public interest.

(5) The Federal work force should be used efficiently and effectively.

(6) Employees should be retained on the basis of the adequacy of their performance, inadequate performance should be corrected, and employees should be separated who cannot or will not improve their performance to meet required standards.

(7) Employees should be provided effective education and training in cases in which such education and training would result in better organizational and individual performance.

(8) Employees should be —

(A) protected against arbitrary action, personal favoritism, or coercion for partisan political purposes, and

(B) prohibited from using their official authority or influence for the purpose of interfering with or affecting the result of an election or a nomination for election.

(9) Employees should be protected against reprisal for the lawful disclosure of information which the employees reasonably believe evidences —

(A) a violation of any law, rule, or regulation, or

(B) mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.

(c) In administering the provisions of this chapter —

(1) with respect to any agency (as defined in section 2302(a)(2)(C) of this title), the President shall, pursuant to the authority otherwise available under this title, take any action, including the issuance of rules, regulations, or directives; and

(2) with respect to any entity in the executive branch which is not such an agency or part of such an agency, the head of such entity shall, pursuant to authority otherwise available, take any action, including the issuance of rules, regulations, or directives;

which is consistent with the provisions of this title and which the President or the head, as the case may be, determines is necessary to ensure that personnel management is based on and embodies the merit system principles.

§ 2302. Prohibited personnel practices

(a)(1) For the purpose of this title, "prohibited personnel practice" means any action described in subsection (b) of this section.

(2) For the purpose of this section —

(A) "personnel action" means —

(i) an appointment;

(ii) a promotion;

(iii) an action under chapter 75 of this title or other disciplinary or corrective action;

(iv) a detail, transfer, or reassignment;

(v) a reinstatement;

(vi) a restoration;

(vii) a reemployment;

(viii) a performance evaluation under chapter 43 of this title;

(ix) a decision concerning pay, benefits, or awards concerning education or training if the education or training may reasonably be expected to lead to an appointment, promotion, performance evaluation, or other action described in this subparagraph; and

(x) any other significant change in duties or responsibilities which is inconsistent with the employee's salary or grade level;

with respect to an employee in, or applicant for, a covered position in an agency;

(B) "covered position" means any position in the

competitive service, a career appointee position in the Senior Executive Service, or a position in the excepted service, but does not include —

(i) a position which is excepted from the competitive service because of its confidential, policy-determining, policy-making, or policy-advocating character; or

(ii) any position excluded from the coverage of this section by the President based on a determination by the President that it is necessary and warranted by conditions of good administration.

(C) "agency" means an Executive agency and the Government Printing Office, but does not include —

(i) a Government corporation;

(ii) the Federal Bureau of Investigation, the Central Intelligence Agency, the Defense Intelligence Agency, the National Security Agency, and, as determined by the President, any Executive agency or unit thereof the principal function of which is the conduct of foreign intelligence or counterintelligence activities; or

(iii) the General Accounting Office.

(b) Any employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority —

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(1) discriminate for or against any employee or applicant for employment —

(A) on the basis of race, color, religion, sex, or national origin, as prohibited under section 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16);

(B) on the basis of age, as prohibited under sections 12 and 15 of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 631, 633a);

(C) on the basis of sex, as prohibited under section 6(d) of the Fair Labor Standards Act of 1938 (29 U.S.C. 206(d));

(D) on the basis of handicapping condition, as prohibited under section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791); or

(E) on the basis of marital status or political affiliation, as prohibited under any law, rule, or regulation;

(2) solicit or consider any recommendation or statement, oral or written, with respect to any individual who requests or is under consideration for any personnel action except as provided under section 3303(f);

(3) coerce the political activity of any person (including the providing of any political contribution or service), or take any action against any employee or applicant for employment as a reprisal for the refusal of any person to engage in such political activity;

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(4) deceive or willfully obstruct any person with respect to such person's right to compete for employment;

(5) influence any person to withdraw from competition for any position for the purpose of improving or injuring the prospects of any other person for employment;

(6) grant any preference or advantage not authorized by law, rule, or regulation to any employee or applicant for employment (including defining the scope or manner of competition or the requirements for any position) for the purpose of improving or injuring the prospects of any particular person for employment;

(7) appoint, employ, promote, advance, or advocate for appointment, employment, promotion, or advancement, in or to a civilian position any individual who is a relative (as defined in section 3110(a)(3) of this title) of such employee if such position is in the agency in which such employee is serving as a public official (as defined in section 3110(a)(2) of this title) or over which such employee exercises jurisdiction or control as such an official;

(8) take or fail to take, or threaten to take or fail to take, a personnel action with respect to any employee or applicant for employment because of —

(A) any disclosure of information by an employee or applicant which the employee or applicant reasonably believes evidences —

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(i) a violation of any law, rule, or regulation, or

(ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety,

if such disclosure is not specifically prohibited by law and if such information is not specifically required by Executive order to be kept secret in the interest of national defense of the conduct of foreign affairs; or

(B) any disclosure to the Special Counsel, or to the Inspector General of an agency or another employee designated by the head of the agency to receive such disclosures, of information which the employee or applicant reasonably believes evidences —

(i) a violation of any law, rule, or regulation, or

(ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety;

(9) take or fail to take, or threaten to take or fail to take, any personnel action against any employee or applicant for employment because of —

(A) the exercise of any appeal, complaint, or grievance right granted by any law, rule, or regulation;

(B) testifying for or otherwise lawfully assisting

any individual in the exercise of any right referred to in sub-paragraph (A);

(C) cooperating with or disclosing information to the Inspector General of an agency, or the Special Counsel, in accordance with applicable provisions of law; or

(D) for refusing to obey an order that would require the individual to violate a law.

(10) discriminate for or against any employee or applicant for employment on the basis of conduct which does not adversely affect the performance of the employee or applicant or the performance of others; except that nothing in this paragraph shall prohibit an agency from taking into account in determining suitability or fitness any conviction of the employee or applicant for any crime under the laws of any State, of the District of Columbia, or of the United States; or

(11) take or fail to take any other personnel action if the taking of or failure to take such action violates any law, rule, or regulation implementing, or directly concerning, the merit system principles contained in section 2301 of this title.

This subsection shall not be construed to authorize the withholding of information from the Congress or the taking of any personnel action against an employee who discloses information to the Congress.

(c) The head of each agency shall be responsible for the

prevention of prohibited personnel practices, for the compliance with and enforcement of applicable civil service laws, rules, and regulations, and other aspects of personnel management. Any individual to whom the head of an agency delegates authority for personnel management, or for any aspect thereof, shall be similarly responsible within the limits of the delegation.

(d) This section shall not be construed to extinguish or lessen any effort to achieve equal employment opportunity through affirmative action or any right or remedy available to any employee or applicant for employment in the civil service under —

(1) section 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16), prohibiting discrimination on the basis of race, color, religion, sex, or national origin;

(2) sections 12 and 15 of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 631, 633a), prohibiting discrimination on the basis of age;

(3) under section 6(d) of the Fair Labor Standards Act of 1938 (29 U.S.C. 206(d)), prohibiting discrimination on the basis of sex;

(4) section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791), prohibiting discrimination on the basis of handicapping condition; or

(5) the provisions of any law, rule, or regulation prohibiting discrimination on the basis of marital status or political affiliation.

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§ 2303. Prohibited personnel practices in the Federal Bureau of Investigation

(a) Any employee of the Federal Bureau of Investigation who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority, take or fail to take a personnel action with respect to any employee of the Bureau as a reprisal for a disclosure of information by the employee to the Attorney General (or an employee designated by the Attorney General for such purpose) which the employee or applicant reasonably believes evidences —

(1) a violation of any law, rule, or regulation, or

(2) mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.

For the purpose of this subsection, "personnel action" means any action described in clauses (i) through (x) of section 2302(a)(2)(A) of this title with respect to an employee in, or applicant for, a position in the Bureau (other than a position of a confidential, policy-determining, policy-making, or policy-advocating character).

. . . . . .

(b) The Attorney General shall prescribe regulations to ensure that such a personnel action shall not be taken against an employee of the Bureau as a reprisal for any disclosure of information described in subsection (a) of this section.

(c) The President shall provide for the enforcement of this section in a manner consistent with applicable provisions of sections 1214 and 1221 of this title.

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§ 2304. Responsibility of the General Accounting Office

(a) If requested by either House of the Congress (or any committee thereof), or if considered necessary by the Comptroller General, the General Accounting Office shall conduct audits and reviews to assure compliance with the laws, rules, and regulations governing employment in the executive branch and in the competitive service and to assess the effectiveness and soundness of Federal personnel management.

(b) The General Accounting Office shall prepare and submit an annual report to the President and the Congress on the activities of the Merit Systems Protection Board and the Office of Personnel Management. The report shall include a description of —

(1) significant actions taken by the Board to carry out its functions under this title; and

(2) significant actions of the Office of Personnel Management, including an analysis of whether or not the actions of the Office are in accord with merit system principles and free from prohibited personnel practices.

§ 2305. Coordination with certain other provisions of law

No provision of this chapter, or action taken under this chapter, shall be construed to impair the authorities and responsibilities set forth in section 102 of the National Security Act of 1947 (61 Stat. 495; 50 U.S.C. 403), the Central Intelligence Agency Act of 1949 (63 Stat. 208; 50 U.S.C. 403a and following), the Act entitled "An Act to provide certain

administrative authorities for the National Security Agency, and for other purposes", approved May 29, 1959 (73 Stat. 63; 50 U.S.C. 402 note), and the Act entitled "An Act to amend the Internal Security Act of 1950", approved March 26, 1964 (78 Stat. 168; 50 U.S.C. 831-835).

CHAPTER 43 — PERFORMANCE APPRAISAL

SUBCHAPTER I — GENERAL PROVISIONS

§ 4301. Definitions

For the purpose of this subchapter —

(1) "agency" means —

(A) an Executive agency; and

(B) the Government Printing Office;

but does not include —

(i) a Government corporation;

(ii) the Central Intelligence Agency, the Defense Intelligence Agency, the National Security Agency, or any Executive agency or unit thereof which is designated by the President and the principal function of which is the conduct of foreign intelligence or counterintelligence activities; or

(iii) the General Accounting Office;

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(2) "employee" means an individual employed in or under an agency, but does not include —

(A) an employee outside the United States who is paid in accordance with local native prevailing wage rates for the area in which employed;

(B) an individual in the Foreign Service of the United States;

(C) a physician, dentist, nurse, or other employee in the Veterans Health Administration of the Department of Veterans Affairs whose pay is fixed under chapter 73 of title 38;

(D) an administrative law judge appointed under section 3105 of this title;

(E) an individual in the Senior Executive Service or the Federal Bureau of Investigation and Drug Enforcement Administration Senior Executive Service;

(F) an individual appointed by the President;

(G) an individual occupying a position not in the competitive service excluded from coverage of this subchapter by regulations of the Office of Personnel Management; or

(H) an individual who (i) is serving in a position under a temporary appointment for less than

one year, (ii) agrees to serve without a performance evaluation, and (iii) will not be considered for a reappointment or for an increase in pay based in whole or in part on performance; and

(3) "unacceptable performance" means performance of an employee which fails to meet established performance standards in one or more critical elements of such employee's position.

§ 4302. Establishment of performance appraisal systems

(a) Each agency shall develop one or more performance appraisal systems which —

(1) provide for periodic appraisals of job performance of employees;

(2) encourage employee participation in establishing performance standards; and

(3) use the results of performance appraisals as a basis for training, rewarding, reassigning, promoting, reducing in grade, retaining, and removing employees.

(b) Under regulations which the Office of Personnel Management shall prescribe, each performance appraisal system shall provide for —

(1) establishing performance standards which will, to the maximum extent feasible, permit the accurate evaluation of job performance on the basis of objective

criteria (which may include the extent of courtesy demonstrated to the public) related to the job in question for each employee or position under the system;

(2) as soon as practicable, but not later than October 1, 1981, with respect to initial appraisal periods, and thereafter at the beginning of each following appraisal period, communicating to each employee the performance standards and the critical elements of the employee's position;

(3) evaluating each employee during the appraisal period of such standards;

(4) recognizing and rewarding employees whose performance so warrants;

(5) assisting employees in improving unacceptable performance; and

(6) reassigning, reducing in grade, or removing employees who continue to have unacceptable performance but only after an opportunity to demonstrate acceptable performance.

§ 4303. Actions based on unacceptable performance

(a) Subject to the provisions of this section, an agency may reduce in grade or remove an employee for unacceptable performance.

(b)(1) An employee whose reduction in grade or removal is proposed under this section is entitled to —

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(A) 30 days' advance written notice of the proposed action which identifies —

(i) specific instances of unacceptable performance by the employee on which the proposed action is based; and

(ii) the critical elements of the employee's position involved in each instance of unacceptable performance;

(B) be represented by an attorney or other representative;

(C) a reasonable time to answer orally and in writing; and

(D) a written decision which —

(i) in the case of a reduction in grade or removal under this section, specifies the instances of unacceptable performance by the employee on which the reduction in grade or removal is based, and

(ii) unless proposed by the head of the agency, has been concurred in by an employee who is in a higher position than the employee who proposed the action.

(2) An agency may, under regulations prescribed by the head of such agency, extend the notice period under subsection (b)(1)(A) of this section for not more than 30 days. An agency may extend the notice period for more than 30 days only in accordance with regulations issued by the Office of Personnel Management.

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(c) The decision to retain, reduce in grade, or remove an employee —

(1) shall be made within 30 days after the date of expiration of the notice period, and

(2) in the case of a reduction in grade or removal, may be based only on those instances of unacceptable performance by the employee —

(A) which occurred during the 1-year period ending on the date of the notice under subsection (b)(1)(A) of this section in connection with the decision; and

(B) for which the notice and other requirements of this section are complied with.

(d) If, because of performance improvement by the employee during the notice period, the employee is not reduced in grade or removed, and the employee's performance continues to be acceptable for 1 year from the date of the advance written notice provided under subsection (b)(1)(A) of this section, any entry or other notation of the unacceptable performance for which the action was proposed under this section shall be removed from any agency record relating to the employee.

(e) Any employee who is —

(1) a preference eligible;

(2) in the competitive service; or

(3) in the excepted service and covered by subchapter II of chapter 75,

and who has been reduced in grade or removed under this section is entitled to appeal the action to the Merit Systems Protection Board under section 7701.

(f) This section does not apply to —

(1) the reduction to the grade previously held of a supervisor or manager who has not completed the probationary period under section 3321(a)(2) of this title,

(2) the reduction in grade or removal of an employee in the competitive service who is serving a probationary or trial period under an initial appointment or who has not completed 1 year of current continuous employment under other than a temporary appointment limited to 1 year or less, or

(3) the reduction in grade or removal of an employee in the excepted service who has not completed 1 year of current continuous employment in the same or similar positions.

§ 4304. Responsibilities of the Office of Personnel Management

(a) The Office of Personnel Management shall make technical assistance available to agencies in the development of performance appraisal systems.

(b)(1) The Office shall review each performance

appraisal system developed by any agency under this section and determine whether the performance appraisal system meets the requirements of this subchapter.

(2) The Comptroller General shall from time to time review on a selected basis performance appraisal systems established under this subchapter to determine the extent to which any such system meets the requirements of this subchapter and shall periodically report its findings to the Office and to the Congress.

(3) If the Office determines that a system does not meet the requirements of this subchapter (including regulations prescribed under section 4305), the Office shall direct the agency to implement an appropriate system or to correct operations under the system, and any such agency shall take any action so required.

§ 4305. Regulations

The Office of Personnel Management may prescribe regulations to carry out the purpose of this subchapter.

CHAPTER 77 — APPEALS

§ 7701. Appellate procedures

(a) An employee, or applicant for employment, may submit an appeal to the Merit Systems Protection Board from any action which is appealable to the Board under any law, rule, or regulation. An appellant shall have the right —

(1) to a hearing for which a transcript will be kept; and

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(2) to be represented by an attorney or other representative.

Appeals shall be processed in accordance with regulations prescribed by the Board.

(b)(1) The Board may hear any case appealed to it or may refer the case to an administrative law judge appointed under section 3105 of this title or other employee of the Board designated by the Board to hear such cases, except that in any case involving a removal from the service, the case shall be heard by the Board, an employee experienced in hearing appeals, or an administrative law judge. The Board, administrative law judge, or other employee (as the case may be) shall make a decision after receipt of the written representations of the parties to the appeal and after opportunity for a hearing under subsection (a)(1) of this section. A copy of the decision shall be furnished to each party to the appeal and to the Office of Personnel Management.

(2)(A) If an employee or applicant for employment is the prevailing party in an appeal under this subsection, the employee or applicant shall be granted the relief provided in the decision effective upon the making of the decision, and remaining in effect pending the outcome of any petition for review under subsection (e), unless —

(i) the deciding official determines that the granting of such relief is not appropriate; or

(ii)(I) the relief granted in the decision provides that such employee or applicant shall return or be present at the place of employment during the period pending the

outcome of any petition for review under subsection (e); and

(II) the employing agency, subject to the provisions of subparagraph (B), determines that the return or presence of such employee or applicant is unduly disruptive to the work environment.

(B) If an agency makes a determination under subparagraph (A)(ii)(II) that prevents the return or presence of an employee at the place of employment, and such employee shall receive pay, compensation, and all other benefits as terms and conditions of employment during the period pending the outcome of any petition for review under subsection (e).

(C) Nothing in the provisions of this paragraph may be construed to require any award of back pay or attorney fees be paid before the decision is final.

(3) With respect to an appeal from an adverse action covered by subchapter V of chapter 75, authority to mitigate the personnel action involved shall be available, subject to the same standards as would apply in an appeal involving an action covered by subchapter II of chapter 75 with respect to which mitigation authority under this section exists.

(c)(1) Subject to paragraph (2) of this subsection, the decision of the agency shall be sustained under subsection (b) only if the agency's decision —

(A) in the case of an action based on unacceptable performance described in section 4303 or a removal from

the Senior Executive Service for failure to be recertified under section 3393a, is supported by substantial evidence; or

(B) in any other case, is supported by a preponderance of the evidence.

(2) Notwithstanding paragraph (1), the agency's decision may not be sustained under subsection (b) of this section if the employee or applicant for employment —

(A) shows harmful error in the application of the agency's procedures in arriving at such decision;

(B) shows that the decision was based on any prohibited personnel practice described in section 2302(b) of this title; or

(C) shows that the decision was not in accordance with law.

(d)(1) In any case in which —

(A) the interpretation or application of any civil service law, rule, or regulation, under the jurisdiction of the Office of Personnel Management is at issue in any proceeding under this section; and

(B) the Director of the Office of Personnel Management is of the opinion that an erroneous decision would have a substantial impact on any civil service law, rule, or regulation under the jurisdiction of the Office;

the Director may as a matter of right intervene or otherwise participate in that proceeding before the Board. If the Director exercises his right to participate in a proceeding before the Board, he shall do so as early in the proceeding as practicable. Nothing in this title shall be construed to permit the Office to interfere with the independent decision making of the Merit Systems Protection Board.

(2) The Board shall promptly notify the Director whenever the interpretation of any civil service law, rule, or regulation under the jurisdiction of the Office is at issue in any proceeding under this section.

(e)(1) Except as provided in section 7702 of this title, any decision under subsection (b) of this section shall be final unless —

(A) a party to the appeal or the Director petitions the Board for review within 30 days after the receipt of the decision; or

(B) the Board reopens and reconsiders a case on its own motion.

The Board, for good cause shown, may extend the 30-day period referred to in subparagraph (A) of this paragraph. One member of the Board may grant a petition or otherwise direct that a decision be reviewed by the full Board. The preceding sentence shall not apply if, by law, a decision of an administrative law judge is required to be acted upon by the Board.

(2) The Director may petition the Board for a review

under paragraph (1) of this subsection only if the Director is of the opinion that the decision is erroneous and will have a substantial impact on any civil service law, rule, or regulation under the jurisdiction of the Office.

(f) The Board, or an administrative law judge or other employee of the Board designated to hear a case, may —

(1) consolidate appeals filed by two or more appellants, or

(2) join two or more appeals filed by the same appellant and hear and decide them concurrently,

if the deciding official or officials hearing the cases are of the opinion that the action could result in the appeals' being processed more expeditiously and would not adversely affect any party.

(g)(1) Except as provided in paragraph (2) of this subsection, the Board, or an administrative law judge or other employee of the Board designated to hear a case, may require payment by the agency involved of reasonable attorney fees incurred by an employee or applicant for employment if the employee or applicant is the prevailing party and the Board, administrative law judge, or other employee (as the case may be) determines that payment by the agency is warranted in the interest of justice, including any case in which a prohibited personnel practice was engaged in by the agency or any case in which the agency's action was clearly without merit.

(2) If an employee or applicant for employment is the prevailing party and the decision is based on a finding of

discrimination prohibited under section 2302(b)(1) of this title, the payment of attorney fees shall be in accordance with the standards prescribed under section 706(k) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5(k)).

(h) The Board may, by regulation, provide for one or more alternative methods for settling matters subject to the appellate jurisdiction of the Board which shall be applicable at the election of an applicant for employment or of an employee who is not in a unit for which a labor organization is accorded exclusive recognition, and shall be in lieu of other procedures provided for under this section. A decision under such a method shall be final, unless the Board reopens and reconsiders a case at the request of the Office of Personnel Management under subsection (e) of this section.

(i)(1) Upon the submission of any appeal to the Board under this section, the Board, through reference to such categories of cases, or other means, as it determines appropriate, shall establish and announce publicly the date by which it intends to complete action on the matter. Such date shall assure expeditious consideration of the appeal, consistent with the interests of fairness and other priorities of the Board. If the Board fails to complete action on the appeal by the announced date, and the expected delay will exceed 30 days, the Board shall publicly announce the new date by which it intends to complete action on the appeal.

(2) Not later than March 1 of each year, the Board shall submit to the Congress a report describing the number of appeals submitted to it during the preceding fiscal year, the number of appeals on which it completed action during that year, and the number of instances during that year in which it

failed to conclude a proceeding by the date originally announced, together with an explanation of the reasons therefor.

(3) The Board shall by rule indicate any other category of significant Board action which the Board determines should be subject to the provisions of this subsection.

(4) It shall be the duty of the Board, an administrative law judge, or employee designated by the Board to hear any proceeding under this section to expedite to the extent practicable that proceeding.

(j) In determining the appealability under this section of any case involving a removal from the service (other than the removal of a reemployed annuitant), neither an individual's status under any retirement system established by or under Federal statute nor any election made by such individual under any such system may be taken into account.

(k) The Board may prescribe regulations to carry out the purpose of this section.

§ 7702. Actions involving discrimination

(a)(1) Notwithstanding any other provision of law, and except as provided in paragraph (2) of this subsection, in the case of any employee or applicant for employment who —

(A) has been affected by an action which the employee or applicant may appeal to the Merit Systems Protection Board, and

(B) alleges that a basis for the action was discrimination prohibited by —

(i) section 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16),

(ii) section 6(d) of the Fair Labor Standards Act of 1938 (29 U.S.C. 206(d)),

(iii) section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791),

(iv) sections 12 and 15 of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 631, 633a), or

(v) any rule, regulation, or policy directive prescribed under any provision of law described in clauses (i) through

(iv) of this subparagraph,

the Board shall, within 120 days of the filing of the appeal, decide both the issue of discrimination and the appealable action in accordance with the Board's appellate procedures under section 7701 of this title and this section.

(2) In any matter before an agency which involves —

(A) any action described in paragraph (1)(A) of this subsection; and

(B) any issue of discrimination prohibited under any provision of law described in paragraph (1)(B) of this subsection;

the agency shall resolve such matter within 120 days. The decision of the agency in any such matter shall be a judicially reviewable action unless the employee appeals the matter to the Board under paragraph (1) of this subsection.

(3) Any decision of the Board under paragraph (1) of this subsection shall be a judicially reviewable action as of —

(A) the date of issuance of the decision if the employee or applicant does not file a petition with the Equal Employment Opportunity Commission under subsection (b)(1) of this section, or

(B) the date the Commission determines not to consider the decision under subsection (b)(2) of this section.

(b)(1) An employee or applicant may, within 30 days after notice of the decision of the Board under subsection (a)(1) of this section, petition the Commission to consider the decision.

(2) The Commission shall, within 30 days after the date of the petition, determine whether to consider the decision. A determination of the Commission not to consider the decision may not be used as evidence with respect to any issue of discrimination in any judicial proceeding concerning that issue.

(3) If the Commission makes a determination to consider the decision, the Commission shall, within 60 days after the date of the determination, consider the entire record of the proceedings of the Board and, on the basis of the evidentiary

record before the Board, as supplemented under paragraph (4) of this subsection, either —

(A) concur in the decision of the Board; or

(B) issue in writing another decision which differs from the decision of the Board to the extent that the Commission finds that, as a matter of law —

(i) the decision of the Board constitutes an incorrect interpretation of any provision of any law, rule, regulation, or policy directive referred to in subsection (a)(1)(B) of this section, or

(ii) the decision involving such provision is not supported by the evidence in the record as a whole.

(4) In considering any decision of the Board under this subsection, the Commission may refer the case to the Board, or provide on its own, for the taking (within such period as permits the Commission to make a decision within the 60-day period prescribed under this subsection) of additional evidence to the extent it considers necessary to supplement the record.

(5)(A) If the Commission concurs pursuant to paragraph (3)(A) of this subsection in the decision of the Board, the decision of the Board shall be a judicially reviewable action.

(B) If the Commission issues any decision under paragraph (3)(B) of this subsection, the Commission shall immediately refer the matter to the Board.

(c) Within 30 days after receipt by the Board of the decision of the Commission under subsection (b)(5)(B) of this section, the Board shall consider the decision and —

(1) concur and adopt in whole the decision of the Commission; or

(2) to the extent that the Board finds that, as a matter of law, (A) the commission decision constitutes an incorrect interpretation of any provision of any civil service law, rule, regulation or policy directive, or (B) the Commission decision involving such provision is not supported by the evidence in the record as a whole —

(i) reaffirm the initial decision of the Board; or

(ii) reaffirm the initial decision of the Board with such revisions as it determines appropriate.

If the Board takes the action provided under paragraph (1), the decision of the Board shall be a judicially reviewable action.

(d)(1) If the Board takes any action under subsection (c)(2) of this section, the matter shall be immediately certified to a special panel described in paragraph (6) of this subsection. Upon certification, the Board shall, within 5 days (excluding Saturdays, Sundays, and holidays), transmit to the special panel the administrative record in the proceeding, including —

(A) the factual record compiled under this section,

(B) the decisions issued by the Board and the Commission under this section, and

(C) any transcript of oral arguments made, or legal briefs filed, before the Board or the Commission.

(2)(A) The special panel shall, within 45 days after a matter has been certified to it, review the administrative record transmitted to it and, on the basis of the record, decide the issues in dispute and issue a final decision which shall be a judicially reviewable action.

(B) The special panel shall give due deference to the respective expertise of the Board and Commission in making its decision.

(3) The special panel shall refer its decision under paragraph (2) of this subsection to the Board and the Board shall order any agency to take any action appropriate to carry out the decision.

(4) The special panel shall permit the employee or applicant who brought the complaint and the employing agency to appear before the panel to present oral arguments and to present written arguments with respect to the matter.

(5) Upon application by the employee or applicant, the Commission may issue such interim relief as it determines appropriate to mitigate any exceptional hardship the employee or applicant might otherwise incur as a result of the certification of any matter under this subsection, except that the Commission may not stay, or order any agency to review on an interim basis, the action referred to in subsection (a)(1) of this section.

(6)(A) Each time the Board takes any action under

subsection (c)(2) of this section, a special panel shall be convened which shall consist of —

(i) an individual appointed by the President, by and with the advice and consent of the Senate, to serve for a term of 6 years as chairman of the special panel each time it is convened;

(ii) one member of the Board designated by the Chairman of the Board each time a panel is convened; and

(iii) one member of the Commission designated by the Chairman of the Commission each time a panel is convened.

The chairman of the special panel may be removed by the President only for inefficiency, neglect of duty, or malfeasance in office.

(B) The chairman is entitled to pay at a rate equal to the maximum annual rate of basic pay payable under the General Schedule for each day he is engaged in the performance of official business on the work of the special panel.

(C) The Board and the Commission shall provide such administrative assistance to the special panel as may be necessary and, to the extent practicable, shall equally divide the costs of providing the administrative assistance.

(e)(1) Notwithstanding any other provision of law, if at any time after —

(A) the 120th day following the filing of any matter

described in subsection (a)(2) of this section with an agency, there is not judicially reviewable action under this section or an appeal under paragraph (2) of this subsection;

(B) the 120th day following the filing of an appeal with the Board under subsection (a)(1) of this section, there is no judicially reviewable action (unless such action is not as the result of the filing of a petition by the employee under subsection (b)(1) of this section); or

(C) the 180th day following the filing of a petition with the Equal Employment Opportunity Commission under subsection (b)(1) of this section, there is no final agency action under subsection (b), (c), or (d) of this section;

an employee shall be entitled to file a civil action to the same extent and in the same manner as provided in section 717(c) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16(c)), section 15(c) of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 633a(c)), or section 16(b) of the Fair Labor Standards Act of 1938 (29 U.S.C. 216(b)).

(2) If, at any time after the 120th day following the filing of any matter described in subsection (a)(2) of this section with an agency, there is no judicially reviewable action, the employee may appeal the matter to the Board under subsection (a)(1) of this section.

(3) Nothing in this section shall be construed to affect the right to trial de novo under any provision of law described in subsection (a)(1) of this section after a judicially reviewable

action, including the decision of an agency under subsection (a)(2) of this section.

(f) In any case in which an employee is required to file any action, appeal, or petition under this section and the employee timely files the action, appeal, or petition with an agency other than the agency with which the action, appeal, or petition is to be filed, the employee shall be treated as having timely filed the action, appeal, or petition as of the date it is filed with the proper agency.

§ 7703. Judicial review of decision of the Merit Systems Protection Board

(a)(1) Any employee or applicant for employment adversely affected or aggrieved by a final order or decision of the Merit Systems Protection Board may obtain judicial review of the order or decision.

(2) The Board shall be named respondent in any proceeding brought pursuant to this subsection, unless the employee or applicant for employment seeks review of a final order or decision on the merits on the underlying personnel action or on a request for attorney fees, in which case the agency responsible for taking the personnel action shall be the respondent.

(b)(1) Except as provided in paragraph (2) of this subsection, a petition to review a final order or final decision of the Board shall be filed in the United States Court of Appeals for the Federal Circuit. Notwithstanding any other provision of law, any petition for review must be filed within 30 days after the date the petitioner received notice of the final order or decision of the Board.

(2) Cases of discrimination subject to the provisions of section 7702 of this title shall be filed under section 717(c) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16(c)), section 15(c) of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 633a(c)), and section 16(b) of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 216(b)), as applicable. Notwithstanding any other provision of law, any such case filed under any such section must be filed within 30 days after the date the individual filing the case received notice of the judicially reviewable action under such section 7702.

(c) In any case filed in the United States Court of Appeals for the Federal Circuit, the court shall review the record and hold unlawful and set aside any agency action, findings, or conclusions found to be —

(1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(2) obtained without procedures required by law, rule, or regulation having been followed; or

(3) unsupported by substantial evidence;

except that in the case of discrimination brought under any section referred to in subsection (b)(2) of this section, the employee or applicant shall have the right to have the facts subject to trial de novo by the reviewing court.

(d) The Director of the Office of Personnel Management may obtain review of any final order or decision of the Board by filing a petition for judicial review in the United States

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Court of Appeals for the Federal Circuit if the Director determines, in his discretion, that the Board erred in interpreting a civil service law, rule, or regulation affecting personnel management and that the Board's decision will have a substantial impact on a civil service law, rule, regulation, or policy directive. If the Director did not intervene in a matter before the Board, the Director may not petition for review of a Board decision under this section unless the Director first petitions the Board for a reconsideration of its decision, and such petition is denied. In addition to the named respondent, the Board and all other parties to the proceedings before the Board shall have the right to appear in the proceeding before the Court of Appeals. The granting of the petition for judicial review shall be at the discretion of the Court of Appeals.

No. 95-1145

Supreme Court, U.S.
FILED
1996
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1995

ISMAEL R. DIAZ, PETITIONER

v.

DEPARTMENT OF THE AIR FORCE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly concluded that: (1) the harmful error provision of 5 U.S.C. 7701(c)(2)(A) applies to performance-based removals under 5 U.S.C., Ch. 43; and (2) the agency did not fail to inform petitioner of the performance standards applicable to him and of what he needed to accomplish for a successful performance rating.

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In the Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-1145

ISMAEL R. DIAZ, PETITIONER

v.

DEPARTMENT OF THE AIR FORCE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3a-8a) is reported at 63 F.3d 1107. The order of the Merit Systems Protection Board (Pet. App. 9a-11a) denying the petition for review is unpublished, but the decision is noted at 65 M.S.P.R. 509 (Table). The initial opinion of the Merit Systems Protection Board (Pet. App. 12a-50a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 21, 1995. A petition for rehearing was denied on October 17, 1995. Pet. App. 1a-2a. The petition for a writ of certiorari was filed on January 16, 1996 (the Tuesday following a holiday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner was a GS-13 Chemist in the Directorate of Aerospace Fuels Management at Kelly Air Force Base, Texas. On January 28, 1993, and again on April 16, 1993, petitioner was put on a performance improvement plan and afforded an opportunity to improve his work performance because of his unacceptable performance level. On October 26, 1993, petitioner received a notice of proposed removal based upon his unacceptable performance. On February 2, 1994, petitioner was issued a final decision removing him from his position with the Air Force. Pet. App. 4a-5a.

2. Pursuant to 5 U.S.C. 4303(c)(1), a decision regarding a proposed removal "shall be made within 30 days after the date of expiration of the notice period." Petitioner was informed of his proposed removal on October 26, 1993, triggering the start of a notice period of 30 days (see 5 U.S.C. 4303(b)(1)) that expired on November 25, 1993. Pet. App. 6a. Petitioner's removal on February 2, 1994, occurred more than 30 days after the expiration of the notice period. *Ibid.*

Petitioner appealed his removal to the Merit Systems Protection Board (MSPB). In the MSPB's initial decision, an administrative judge sustained the Air Force's decision to remove petitioner based upon his unacceptable performance. Pet. App. 37a. In

addition, the administrative judge concluded that, although petitioner's removal more than 30 days after the expiration of the notice period constituted a procedural violation, petitioner had failed to establish that he had been harmed by the error as required by 5 U.S.C. 7701(c)(2)(A). Pet. App. 42a. On November 18, 1994, the MSPB denied petitioner's petition for review. *Id.* at 9a-10a.

3. The court of appeals affirmed the MSPB's decision. Pet. App. 4a-8a. The court concluded that the harmful error standard of 5 U.S.C. 7701(c)(2)(A) applies to performance-based removals pursuant to 5 U.S.C., Ch. 43. Pet. App. 7a-8a. In addition, the court rejected petitioner's claim that the Air Force had not adequately communicated the performance standards for his employment. *Id.* at 8a. The court of appeals denied petitioner's request for rehearing with a suggestion for rehearing *in banc*. *Id.* at 1a-2a.

ARGUMENT

The court of appeals correctly concluded that the harmful error standard of 5 U.S.C. 7701(c)(2)(A) applies to performance-based removals made pursuant to 5 U.S.C., Ch. 43. The court also correctly rejected petitioner's argument that the Air Force did not adequately communicate to petitioner the performance standards for his employment and the actions necessary to meet those standards.

1. In enacting the Civil Service Reform Act of 1978 (CSRA), Pub. L. No. 95-454, 92 Stat. 1111 (5 U.S.C. 1101 *et seq.*), Congress established a new performance appraisal system that provided for dismissal based upon unacceptable performance. 5 U.S.C., Ch. 43; see also S. Rep. No. 969, 95th Cong., 2d Sess. 2 (1978). As part of that legislative reform, Congress also created

three affirmative defenses for employees challenging removals:

> (2) Notwithstanding paragraph (1) [setting forth minimum evidentiary showings an agency must make for a decision to be sustained], the agency's decision may not be sustained under subsection (b) of this section [detailing appeal process] if the employee or applicant for employment—
>
> > (A) shows harmful error in the application of the agency's procedures in arriving at such a decision;
> >
> > (B) shows that the decision was based on any prohibited personnel practice described in section 2302(b) of this title; or
> >
> > (C) shows that the decision was not in accordance with law.

5 U.S.C. 7701(c)(2).

The MSPB has correctly interpreted Section 7701(c)(2)(A) as providing that procedural errors committed in a performance-based employment action are not a basis for reversing an agency action unless the employee demonstrates that he or she was harmed by the error. See, *e.g.*, *Parker* v. *Defense Logistics Agency*, 1 M.S.P.R. 505, 512-513 (1980). In *Handy* v. *USPS*, 754 F.2d 335, 338 (Fed. Cir. 1985), the Court of Appeals for the Federal Circuit held that harmful error analysis applies to conduct-based removals pursuant to 5 U.S.C., Ch. 75.[1] Prior to the present

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[1] "Chapter 75 covers 'adverse personnel actions'—removal, suspension, furlough, reduction in grade and pay—taken to

case, the court of appeals had not specifically addressed whether Section 7701(c)(2)(A) necessitates harmful error analysis for procedural errors in performance-based removals under 5 U.S.C., Ch. 43 as well, but the court had applied such an analysis in a performance-based removal case in *Martin* v. *FAA*, 795 F.2d 995, 999 (Fed. Cir. 1986).

The legislative history surrounding the enactment of the CSRA supports the conclusion that Congress intended to apply a harmful error standard to procedural violations in both Chapter 75 (conduct-based) and Chapter 43 (performance-based) removal proceedings: "In enacting the Civil Service Reform Act of 1978, Congress declared that [the reviewing] court should reverse agency actions for procedural error 'only if the procedures followed substantially impaired the rights of the employees.'" *Brewer* v. *USPS*, 647 F.2d 1093, 1097 (Ct. Cl. 1981), cert. denied, 454 U.S. 1144 (1982) (quoting S. Rep. No. 969, 95th Cong., 2d Sess. 64 (1978)); see also *Adams* v. *Department of Transp.*, 735 F.2d 488, 496 (Fed. Cir.) (Nies, J., concurring), cert. denied, 469 U.S. 1018 (1984); *Baracco* v. *Department of Transp.*, 15 M.S.P.R. 112, 119-120 (1983), aff'd *sub nom. Adams* v. *Department of Transp.*, 735 F.2d 488 (Fed. Cir.), cert. denied, 469 U.S. 1018 (1984); *Parker*, 1 M.S.P.R. at 512-513. Nothing in Section 7701(c)(2), which provides for appeals of agency decisions, differentiates between performance-based removals pursuant to Chapter 43

'promote the efficiency of the service' (i.e., involving employee misconduct). 5 U.S.C. §§ 7503, 7513 (1988)." *Bosco* v. *United States*, 931 F.2d 879, 883 (Fed. Cir. 1991).

and conduct-based removals pursuant to Chapter 75. See 5 U.S.C. 7701(c)(2).[2]

2. Petitioner contends (Pet. 12-21) that issuance of his removal decision more than 30 days after the expiration of the notice period rendered that decision "not in accordance with law" in violation of 5 U.S.C. 7701(c)(2)(C). Petitioner relies upon the mandatory nature of the term "shall" in 5 U.S.C. 4303(c) to argue that the procedural violation here rendered the removal decision unlawful. In *Brock* v. *Pierce County*, 476 U.S. 253 (1986), similar mandatory language directed that the Secretary of Labor "shall" issue a final determination within 120 days. *Id.* at 256. Despite the mandatory nature of that language, this Court concluded that the Secretary did not lose jurisdiction to issue a determination outside the specified period because Congress had not established any penalty for failure to conform to the time requirement and had not stated that the Secretary could not act beyond the statutory time period. *Id.* at 266.

Petitioner maintains (Pet. 8-9) that this Court's decision in *Brock* is distinguishable, because Congress provided a penalty for violations of the statutory notice period when it enacted the affirmative defenses contained in Section 7701(c)(2). Petitioner argues that Congress intended that any failure to comply with the notice period renders an agency action not in accordance with the law and, therefore, subject to a Section 7701(c)(2)(C) objection.

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[2] As the MSPB noted, the procedural violation actually worked to petitioner's benefit in this case by effectively extending the time within which he might improve his performance. Pet. App. 41a-42a.

Petitioner's argument disregards the context of Section 7701(c)(2). The harmful error provision contained in subsection (A), which specifically covers "error[s] in the application of the agency's procedures," would be effectively negated on petitioner's reading, because any decision involving a procedural violation—whether harmful or not—would require reversal as a decision "not in accordance with law." Petitioner's argument would thus effectively hold that a procedural violation is harmful *per se*, removing the employee's statutory burden of proving the harm of any error resulting from a procedural violation. See *Handy*, 754 F.2d at 336-337; *Adams*, 735 F.2d at 496 (Nies, J., concurring).[3]

3. Petitioner also argues (Pet. 12-21) that his removal more than 30 days after the expiration of the notice period constituted a prohibited personnel practice, which, pursuant to Section 7701(c)(2)(B), may not be sustained on appeal. 5 U.S.C. 7701(c)(2)(B).

This argument parallels petitioner's argument concerning the "not in accordance with law" defense and should be rejected for the same reasons. Petitioner's interpretation would automatically convert all violations of procedural statutes, rules, or regulations into prohibited personnel practices requiring reversal of agency decisions. Employees would not have to demonstrate harmful error arising from an

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[3] The court of appeals' interpretation of the statute, on the other hand, preserves a sphere of operation for Section 7701(c)(2)(C). See, *e.g.*, *Hamilton* v. *USPS*, 58 M.S.P.R. 486 (1993) (agency's demotion action is "not in accordance with law" where decision letter was signed by deciding official four days after she retired and thus had no legal authority to demote agency employees; decision must be made by agency official).

agency's procedural irregularity; rather, the procedural violation of a statute, rule, or regulation would, on petitioner's reading, always constitute a prohibited personnel practice in violation of Section 2302(b)(11). As noted above, however, the legislative history accompanying the enactment of the CSRA emphasizes that agency actions should be reversed for procedural violation only if "the procedures followed substantially impaired the rights of the employees." *Brewer*, 647 F.2d at 1097, quoting S. Rep. No. 969, 95th Cong., 2d Sess. 64 (1978).

4. Finally, petitioner argues (Pet. 19-20) that the agency failed to inform him of his performance standard and what specifically he needed to improve in order to meet that standard, and that this asserted failure constituted a prohibited personnel practice. The MSPB, however, found that the Air Force had informed petitioner of his performance standards and what he needed to do in order to meet them. Pet. App. 17a-18a. The board's findings were supported by substantial evidence and were properly affirmed by the court of appeals. *Id.* at 8a. Further review of that factual matter is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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